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**THE REGULATION OF BUSINESS RESCUE
PRACTITIONERS IN SOUTH AFRICA**

BY

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**This research project is submitted in partial fulfilment of the
regulations for the Master of Laws (LLM) at the University of
KwaZulu Natal**

DECLARATION

This research has not been previously accepted in full or partial fulfilment for any other degree and is not being currently considered for any other degree or qualification at any other university.

I declare that this thesis contains my own work except where specifically acknowledged.

I further declare that I have obtained the necessary authorisation and consent to carry out this research.

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Signed and dated at Pietermaritzburg on the 7th day of March 2017.

Caroline Muunda Monga

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INTRODUCTION

Business rescue is defined in the Companies Act 71 of 2008 (hereafter the “Companies Act”) as proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for its temporary supervision by a business rescue practitioner who formulates and implements a rescue plan, and by providing for a moratorium on all legal proceedings of creditors against a company.¹ The aim of business rescue as described in section 7k of the Companies Act is ‘to provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders.’

Globally, regardless of context, it is accepted that the rescue of businesses that have the potential to be revived is essential because a failed business has far-reaching consequences for various stakeholders such as creditors, employees and shareholders which in turn make up national economic development.² Business rescue and the regulation of the skills and experience of business rescue practitioners is essential because a company forms part of a collective and its failure will not only affect its members and creditors, but its employees, suppliers, distributors and in turn the community that is need of the company’s services.³ This appreciation has given rise to rescue culture⁴ in various countries, especially those with developing economies like South Africa⁵ and Nigeria.⁶ Consequently, it is important to have

¹ The Companies Act 71 of 2008, s128.

² A Loubser ‘Aiding the Development of a New Insolvency Law in South Africa: the UNCITRAL Draft Legislative Guide on Insolvency Law’ (2003) 15 *SA Merc LJ* 398; See also A Loubser ‘Judicial Management as a business rescue procedure in South African Corporate law’ (2004) 16 *SA Merc LJ* 137.

³ A Loubser ‘Judicial Management as a business rescue procedure in South African Corporate law’ (2004) 16 *SA Merc LJ* 137.

⁴ M Hunter ‘Nature & Function of a Rescue Culture’ (1999) 104 *Commercial Law Journal* 426 states that rescue culture means the preservation of viable businesses; See also RW Harmer ‘Comparison of Trends in National Law: The Pacific Rim’ (1997-1998) 23 *Brooklyn Journal of International Law* 148; See also H Rajak & J Henning ‘Business Rescue for South Africa’ (1999) 116 *SALJ* 277-279 suggestions on the development of a rescue culture.

⁵ R Bradstreet ‘The Leak in the Chapter 6 Lifeboat: Inadequate Regulation of Business Rescue Practitioners May Adversely Affect Lenders’ Willingness and the Growth of the Economy’ (2010) 22 *SA Merc LJ* 198 states that ‘successful business enterprises are the cogs that drive South Africa’s developing economy’; See also MR Rochelle ‘Lowering the Penalties for Failure: Using the Insolvency Law as a Tool for Spurring Economic Growth; the American Experience, and Possible Uses for South Africa’ 1996 *TSAR* 315-7 where the author states that the “fresh-start” approach originated in America and has spread to other countries.

⁶ S Mba *Rethinking Business Rescue in Nigeria: Borrowing Virtues from Chapter 11 of the US Bankruptcy Code* (unpublished LLM thesis, Central European University (CEU), Legal Studies Department, 2015).

in place an 'efficient and well-functioning'⁷ business rescue mechanism that enables a business to be rescued.

Thus, there is a need to adequately regulate the persons in charge of the rescue, as they take on this difficult task. Therefore, the skills and the experience of Business Rescue Practitioners (hereafter "BRPs") must be properly regulated.

In order to ascertain whether the skills and experience of BRPs are adequately regulated in South Africa, one must look at other jurisdictions; hence this paper analyzes the regulation of the skills and experience of South African BRPs against that of their English counterparts. Furthermore, our insolvency law is primarily based upon English insolvency laws.⁸ Since South African business rescue laws have only been in place for 5 years (at the time of writing this paper), England also provides a long standing-jurisdiction that has a highly regulated insolvency industry, against which it is possible to weigh the adequacy of "new" (post-apartheid) South African laws and gauge to what extent they may require amending in order to better suit the South Africa's current context.⁹

Considering that the South African government has been proposing entrepreneurship from 'grass roots level' as a means of developing the country's economy and addressing unemployment, the contradictions inherent in the definition of business in the National Small Business Act¹⁰ and the Companies Act identifies a weak spot in the overall legislation as it relates to the regulation of the skills and experience of BRPs in South Africa. A report by the World Bank on *South Africa economic update: jobs and South Africa's changing demographics*, states that with one-third of the labour force being without work or discouraged, unemployment in post apartheid South Africa is higher than in 1994 and further states that South Africa's youth have not been adequately equipped by the education system for employment in a labour market that is skills based."¹¹

⁷ A Loubser 'Business Rescue in South Africa: a procedure in search of a new home?' (2007) 40 *CILSA* 152.

⁸ DA Burdette *Framework for Corporate Insolvency law reform in South Africa* (unpublished LLD dissertation, University of Pretoria 2002) Part 2 77.

⁹ J Calitz 'Some thoughts on state regulation of South African insolvency law' 2011 *De Jure* 310; See generally N Martin 'Common-Law Bankruptcy Systems: Similarities and Differences' (2003) 11 *ABI Law Review* 369.

¹⁰ Act 102 of 1996.

¹¹ 'South Africa unemployment is worse now than at the end of apartheid' available at <https://businesstech.co.za/news/government/95983/south-africa-unemployment-is-worse-now-than-at-the-end-of-apartheid/>, accessed on 29 Jan 2017.

Prior to the 2008 Act being enacted, Rochelle in an article based on a presentation at Rand Afrikaans University delivered in August 1995 draws a comparison between the American experience after the Great Depression and the South African experience.¹² Based on events in South Africa at that time, she purports that:

“one can hypothesize that the last decade forms the same kind of triple watershed that took 100 years to occur in America. For whites, the “frontier” of race-based opportunity is gone, and the next generation of white citizens will face far greater competition for places both in the educational system and in the workforce. For blacks, the promise of political equality must ring hollow, in part, until economic opportunity also becomes more equal. For black and white together, the challenge is to bring the economic benefits currently enjoyed by white society to everyone, regardless of colour. To do so will require faster economic growth than was had under the previous regime. If such growth is to be accomplished, and if South Africa is to become the engine that pulls the sub-Saharan economy in the next century, resources must be maximized. To do that, the legal system should provide a comparatively soft landing for individuals and companies with financial problems: the insolvency laws need to change.”¹³

The Companies Act created a new profession of BRPs, whose skills and experience are regulated by this Act, but perhaps creates too soft a landing. Chapter 6 of the Companies Act on business rescue and the new profession of BRPs will be shown in this paper to not meet the needs of the greater South African population of previously disadvantaged individuals (“PDIs”) as it should. Rochelle, having suggested that South African insolvency laws need to change, draws a further contrast between the American and South African approaches to company law.¹⁴ America’s insolvency laws contain a debtor-in-possession regime, whereby the insolvent company, and not the BRP, remains in control of its administration during corporate rescue.¹⁵ Rochelle points out that a debtor-friendly approach as applied in America has a more positive effect for the entrepreneur,¹⁶ an approach which if revisited may be found to be beneficial in the application to the informal sector of South Africa as debtor-in-possession regimes are more beneficial to small businesses.

¹² Rochelle op cit note 5

¹³ Ibid 317.

¹⁴ Ibid 317-318.

¹⁵ Rajak & Henning op cit note 4 at 282.

¹⁶ Rochelle op cit note 5 at 321.

A 'small business organisation' in South Africa is defined under the National Small Business Act as an entity whether or not registered or incorporated under any law.¹⁷ Even though unregistered entities are seemingly considered businesses by the National Small Business Act, the Companies Act upon which the regulation of skills and experience of business rescue practitioners is founded, does not include unregistered businesses.¹⁸ The Companies Act states that business rescue is the rescue of a financially distressed company. The Companies Act defines a company as a company registered in terms of the Companies Act or the Close Corporation Act¹⁹. A further definition given in the National Small Business Act is that a "small business" means a separate and distinct business entity, including cooperative enterprises and non-governmental organisations, managed by one owner or more which, including its branches or subsidiaries, if any, which can be classified as a micro-, a very small, a small or a medium enterprise²⁰ ("SMMEs").

Although legislatively sound, the regulation of business rescue in South Africa is exclusionary because this definition of business in the Companies Act does not encompass the informal sector (which is in fact made up of the majority of the population, being Black South Africans)²¹ that is included in the definition of 'small business organisation'. This means that the majority of the population does not have access to business rescue. Considering that South African business rescue laws are only 5 years old and that the current database of practitioners consists of a mere 218 recognised professionals,²² it may be argued that these laws regulate a virtually stagnant industry in South Africa as far as skills development is concerned.

Based as they are upon English company law, South Africa's legislation governing the formation, development and rescue of business insofar as insolvency law and the regulation

¹⁷ 102 of 1996, s1 definitions.

¹⁸ Rajak and Henning op cit note 4 at 273 where the authors recommend that business rescue 'should be available irrespective of the status of the debtor, whether incorporated, unincorporated or an individual...South African courts are well used to the issue of defining the meaning of 'business', and any difficulty occasioned thereby will be a small price for the smooth efficiency which should result from a single business-rescue regime for all debtors.'

¹⁹ Close Corporation Act 69 of 1984

²⁰ 102 of 1996, s1 definitions.

²¹ 'South Africa's population' available at <https://www.brandsouthafrica.com/people-culture/people/population>, accessed on 11 Feb 2017, states that according to the 2011 Census, South Africa has a population of 51 770 560 and black South Africans make up the majority which is 79.2%)

²² 'List of licensed business rescue practitioners as at 13 december 2016' available at <http://www.cjpc.co.za/index.php/publications/business-rescue/>, accessed on 19 Feb 2017.

of the skills and experience of BRPs are concerned, are insufficient when measured against the scope of the definition of business as it is currently defined by the National Small Business Act. BRPs may only rescue businesses that are categorized as such by the Companies Act: a registered company or registered close corporation.²³ This nullifies the definition of business as it is described by the National Small Business Act and hence excludes vulnerable businesses as well as businesses that fall into the category of what is known in South Africa as the 'informal economy'²⁴, as well as informal workers in formal/semi-formal industries, a sector largely made up of 'entrepreneurs' from the previously disadvantaged Black population.²⁵

If business rescue is essential because a company forms part of a community and its failure will not only affect its members and creditors, but its employees, suppliers, and in turn the community that is in need of the company's services, it is a matter of urgency that South Africa evaluate the significance of its mammoth²⁶ informal sector and investigate the creation and implementation of policies and legislation that over time will encourage a merging of at least part of the informal into the formal economy. South Africa must adapt its laws in order to meet the complex requirements of constitutional democracy.²⁷ English law contains within it an assumption of equality based on the integration of its multi-racial,

²³ Act 71 of 2008, chapter 1 part A definitions

²⁴ Valodia, L Lebani, C Skinner and R Devey "Low-waged and informal employment in South Africa" (2006) 60 *Transformation: Critical Perspectives on Southern Africa* 110 defines the informal economy as being made up of persons 'self-employed in unregistered enterprises or as wage workers in unprotected jobs'.

²⁵ 'White vs black unemployment in South Africa' available at <https://businesstech.co.za/news/general/96887/white-vs-black-unemployment-in-south-africa/>, accessed on 29 Jan 2017 states that In 2014, the Black population accounted for 79.3% of the working age population, were under-represented among the employed (73.0%) and were over-represented among the unemployed (85.7%) and comprised (83.3%) of the not economically active population; Further, R Rolfe, D Woodward, A Ligthelm and P Guimaraes "The viability of informal microenterprise in South Africa" 2011 March *Journal of Development Entrepreneurship* 6 states that 'one reason that informal businesses dominate trade and commerce in South Africa is the legacy of isolated and undeserved areas like the informal townships outside major cities; that is, the lack of formal retail in the townships and homelands under apartheid led to entrepreneurial opportunities in the informal sector.'

²⁶ South African Local Government Association 'Informal economy' available at <http://led.co.za/topic/informal-economy>, accessed on 30 Jan 2017.

²⁷ Calitz op cit note 9 at 291.

multi-cultural, multi-national population of its economy which is not the fragmented entity that exists in South Africa.²⁸

England and South Africa both have what is generally accepted as an informal economy. Both countries accept that an informal economy is neither taxed nor government regulated. However, the majority of the informal economy in England is made up of illegal immigrants²⁹ whereas South Africa's informal economy is made up of the large majority of its citizens who are Black.³⁰ In 2012, Britain's informal economy comprised of only 10% of its national income.³¹ This hardly compares to the estimated GDP value of South Africa's informal economy at approximately 28% and around R160 billion, a worth that is 2.5 times larger than the contribution of the entire agricultural sector and 70% of the mining sector to GDP.³² It is useful to note that the estimated size of the informal economy in South Africa not only includes informal traders but also waste collectors, home-based care workers and taxi drivers (transport workers in the United Kingdom)³³, all of which are recognised and regulated professions and industries in the United Kingdom.

The differences in the informal economies of South Africa and England have serious implications with regard to how SMMEs are regulated in these countries. The English government focuses on the acceleration of the growth of SMMEs which it is agreed account for 99% of all United Kingdom businesses and which employs over 12 million people,³⁴

²⁸ 'A fascinating map of the world's most and least racially tolerant countries' *The Washington Post* 15 May 2013 available at <https://www.washingtonpost.com/news/worldviews/wp/2013/05/15/a-fascinating-map-of-the-worlds-most-and-least-racially-tolerant-countries/>, accessed on 19 Feb 2017.

²⁹ 'The Big Question: Why is our informal economy so big, and how can we make it smaller?' available at <http://www.independent.co.uk/news/uk/home-news/the-big-question-why-is-our-informal-economy-so-big-and-how-can-we-make-it-smaller-1789266.html>, accessed on 11 Feb 2017.

³⁰ A further complexity is that South Africa's informal economy also comprises of foreign nationals, see 'Migration and employment in South Africa' *Migration for Work Research Consortium* available at http://www.miworc.org.za/docs/MiWORC-PolicyBrief_2-Migration-and-employment-in-SA.pdf, accessed on 22 Feb 2017 page1.

³¹ 'UK shadow economy worth £150bn' *The Guardian* 4 June 2013 available at <https://www.theguardian.com/business/2013/jun/04/uk-shadow-economy>, accessed on 11 Feb 2017.

³² South African Local Government Association 'Informal economy' available at <http://led.co.za/topic/informal-economy>, accessed on 30 Jan 2017.

³³ South African Local Government Association 'Informal economy' available at <http://led.co.za/topic/informal-economy>, accessed on 30 Jan 2017.

³⁴ 'What is an SME' *The Company Warehouse* available at <https://www.thecompanywarehouse.co.uk/blog/2012/07/31/what-is-an-sme/>, accessed on 12 Jan 2017.

because SMMEs are considered part of the formal economy. In South Africa, SMMEs exist within the grey area created by the National Small Business Act and the Companies and Close Corporations Acts and their paradoxical definitions of business as pointed out above. Hence, SMMEs are 'formal' as long as they remain registered by the Commission and 'informal' if they are unregistered and trading, but whether they are registered or not, fall into the category of 'small business organisation' as defined in the National Small Business Act. This means that there is a sub-category of SMME in South Africa that is 'business' but not a 'rescue-able business'. The adoption of English laws in our company law given this stark contrast can hardly be perceived as practical.

It is imperative that South African law continues adapting itself to its unique context in order to ensure that the economy of this country as it relies on business continues to grow. As much as we can compare laws regulating the skills and experience of South African BRPs with those of English insolvency practitioners because of the fact that South African company law is modelled on English company law, it does not follow that our laws are similarly being tried and tested. The development of a rescue culture in South Africa will rely primarily on the practical application of these laws and a positive effect from the application of these laws can only be gained if the profession is grown in number and there are more stakeholders that are made aware of this new phenomenon.

The methodology that this paper will use is desktop research. It will undertake an analysis of statutes and regulations, case law, journal articles, textbooks and other publications. Databases that are used include Juta, Lexis Nexis, Heinonline, Saflii, Sabinet and Google Scholar. This dissertation follows a contextual approach with some contextual analysis arising out of South Africa's unique apartheid history.

Chapter one provides an overview of administration in England and the mechanisms in place for the monitoring and regulation of the skills and experience of administrators.

Chapter two offers an historical overview of business rescue in South Africa.

Chapter three considers the current laws in place that regulate the skills and experience of BRPs with regard to South Africa's unique contextual challenges.

Chapter four draws conclusions and makes recommendations.

CHAPTER 1

1. ENGLAND

1.1 An historical overview of Administration in England

Administration is the equivalent of South Africa's business rescue. It is governed by the United Kingdom Insolvency Act 1986 (c45)(hereafter the "Insolvency Act"), as inserted by the Enterprise Act 2002 (hereafter the "Enterprise Act"). The Enterprise Act states that 'a company is in administration while the appointment of an administrator is in force.'³⁵ The Insolvency Act, which has been effective from 29 December 1986,³⁶ is largely based on the recommendations of the *Cork Report*³⁷. It was instrumental in furthering business rescue culture in order to preserve "viable commercial businesses."³⁸ Paragraph 732 of the *Cork Report* states that mistrust in insolvency professionals leads to mistrust in the procedures and the insolvency system which without trust is a dysfunctional system. At the time of the Cork Report, it was not necessary for insolvency practitioners to be in possession of any specific qualifications.³⁹ Wheeler in his article states that insolvency practitioners were unregulated as there were no mechanisms for accountability and responsibility,⁴⁰ a situation that this paper proposes exists in South Africa currently.

English lawmakers realized that government had a supervisory role to play in insolvency law as insolvency does not only affect creditors but the society as a whole which invariably is a matter of public interest.⁴¹ Therefore an administrative system, the Insolvency Service("IS"), which is a government wing, was set up. This body is an executive agency of the Department for Business, Innovation and Skills and it is responsible for almost all important insolvency decisions and statutory rules in England.⁴² The Insolvency Service supervises and controls

³⁵ Paragraph 1(2)(a) of Schedule B1.

³⁶ A Loubser *Some Comparative Aspects of Corporate Rescue in South African Company Law* (unpublished LLD dissertation, UNISA, 2010) 164.

³⁷ Report of the Review Committee: *Insolvency Law and Practice, Report of the Review Committee* (Cmnd 8558) Chairman Sir Kenneth Cork GBE (1982) (hereinafter referred to as the "Cork Report")

³⁸ Cork Report, para 198(j).

³⁹ Bradstreet op cit note 5 at 204.

⁴⁰ S Wheeler 'Directors' disqualification: insolvency practitioners and the decision making-process' (1993) 15 *Legal Studies* 290-91.

⁴¹ Calitz op cit note 9 at 294.

⁴² Calitz op cit note 9 at 294

the regulation of insolvency practitioners in England and Wales.⁴³ South Africa lacks a single department with a directive similar in scope to England's Department for Business, Innovation and Skills. This paper proposes that South Africa's Department of Trade and Industry (DTI) as well as the Department of Economic Development Trade and Environmental Affairs (hereafter the "DEDTEA") could enter into a partnership in order to regulate the skills and experience of business rescue practitioners.

The new administration regime in the Enterprise Act replaced administrative receivership. Administrative receivership was an alternative to administration. Under administrative receivership, the holder of a floating charge (a security over all the debtor's movable assets, as the debtor is unable to offer security over fixed assets because it does not own any or because they are already mortgaged to other creditors)⁴⁴ appointed an administrative receiver to realise company assets in his favour and the receiver was allowed to block an administration order by a creditor.⁴⁵ Needless to say, creditors were not content with this regime as it favoured holders of floating charges.⁴⁶ Later, the *Cork Report* made further recommendations and in effect the company voluntary arrangement procedure under Part I of the Insolvency Act 1986 was born.⁴⁷ The company voluntary arrangement procedure allows a company to come to a contractual arrangement for payment with the creditors.⁴⁸ However this procedure was not popular. For example, it lacked a provision for a moratorium which was detrimental as creditors could enforce their claims during the period when the proposal was being prepared.⁴⁹

In July 2001, the Insolvency Service published a White Paper that recommended reforms to the administration procedure.⁵⁰ The White Paper evaluated the aims of the government in

⁴³ A Loubser 'An International Perspective on the Regulation of Insolvency Practitioners' (2007) 19 *SA Merc LJ* 127.

⁴⁴ Rajak and Henning op cit note 4 at 279.

⁴⁵ 'Administrative receivership' Association of Business Recovery Professionals available at https://www.r3.org.uk/media/documents/publications/professional/Creditors_admin_rec.pdf accessed on 27 Feb 2017.

⁴⁶ 'Administration(law)' available at [https://en.wikipedia.org/wiki/Administration\(law\)](https://en.wikipedia.org/wiki/Administration(law)), accessed on 28 Nov 2016.

⁴⁷ Loubser op cit note 36 at 167.

⁴⁸ 'Company Voluntary Arrangements' available at <https://www.gov.uk/company-voluntary-arrangements>, accessed on 22 Feb 2017.

⁴⁹ Loubser op cit note 36 at 167.

⁵⁰ Loubser op cit note 36 at 166.

its reform of insolvency law on procedures.⁵¹ Subsequently, the Enterprise Act came into effect on 15 September 2003 and replaced sections on the administration procedure in Part II of the Insolvency Act 1986,⁵² with those under Schedule B1 to the Insolvency Act 1986 as inserted by s248(2) of the Enterprise Act 2002.⁵³ Nonetheless, the old provisions regulating administration in the Insolvency Act 1986 still apply to administration orders brought to court before 15 September 2003.⁵⁴

The Enterprise Act replaced the four previous aims of administration in s8(3) of the Insolvency Act 1986 with paragraph 3 of Schedule 16 of the Enterprise Act. It should be noted that due to the fact that administration provisions are now contained in a Schedule to the Insolvency Act 1986 rather than in the main Act, the sections are referred to as “paragraphs”.⁵⁵ Paragraph 3(1) lists the three objectives of administration namely, rescuing the company as a going concern or achieving a better result for the company’s creditors as a whole than would be likely if the company were wound up or realizing property in order to make a distribution to one or more secured or preferential creditors.

THE ADMINISTRATOR

Paragraph 1 of the Insolvency Act 1986 describes an administrator as a person appointed under Schedule B1 of the Act to manage the affairs, business and property of the company.

1.2 Appointment

England has strict regulations on the appointment and supervision of insolvency practitioners as a result of suggestions made by the Insolvency Law Review Committee of the Cork Report.⁵⁶ The Act only permits a person who is qualified to act as an insolvency practitioner in relation to the company to be appointed. Only an insolvency practitioner can legally act as an office holder in insolvency matters, for example as a trustee in bankruptcy, as a liquidator, as an administrator and an administrative receiver of a company, and a

⁵¹ SS Bajwa ‘Rescue of Failing Businesses: Does Administration(amended by the Enterprise Act 2002) Adequately Provides for Rescue?’ (January 3, 2013) REFLECTIONS ON CORPORATE, PUBLIC AND INTERNATIONAL LAW.

⁵² Loubser op cit note 36 at 166.

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Loubser op cit note 36 at 170.

⁵⁶ Loubser op cit note 43 at 127.

supervisor of Individual Voluntary Arrangements and Company Voluntary Arrangements.⁵⁷ A person may be appointed as an administrator by the court or out of court by the company or its directors or by the holder of a floating charge.

1.2.1. Appointment by court order

The court may make an order (administration order) appointing a person as an administrator of a company⁵⁸ if it is satisfied that the company is or is likely to become unable to pay its debts and that the administration order is reasonably likely to achieve the purpose of administration.⁵⁹

1.2.2 Appointment by holder of floating charge

A holder of a qualifying floating charge in respect of a company's property may appoint an administrator of the company.⁶⁰

1.2.3 Appointment by company or its directors

An administrator may be appointed by a company or its directors by an administration application.⁶¹

1.3 Qualifications

The Cork Report recommended that insolvency practitioners needed to have minimum professional qualifications and needed to be controlled to ensure competence and to prevent abuse.⁶² The following strict requirements are needed:

To be an insolvency practitioner, the practitioner has to be an individual.⁶³ He must be authorised to act as such by his membership of a Recognised Professional Body (hereafter "RPB") and he or she must be permitted to act as such in terms of the rules of his RPB,⁶⁴ or

⁵⁷ 'How insolvency practitioners are authorised in Great Britain' The Insolvency Service Guide available at <https://www.gov.uk/guidance/how-insolvency-practitioners-are-authorised-in-great-britain>, accessed on 31 Oct 2016.

⁵⁸ Enterprise Act 2002, para 2(a) read with paragraph 10.

⁵⁹ Enterprise Act 2002, para 11.

⁶⁰ Enterprise Act 2002, para 14(1).

⁶¹ Enterprise Act 2002, para 22.

⁶² Loubser op cit note 43 at 127.

⁶³ Insolvency Act 1986, s390(1).

⁶⁴ Insolvency Act 1986, s390(2)(a).

alternatively, in terms of an authorisation by a competent authority (the Secretary of State).⁶⁵

1.3.1 Individual

The insolvency practitioner must be an individual.

1.3.2 Membership of Recognised Professional Bodies

The individual must be a member of a recognised professional body and must be permitted to act as such by the rules of his RPB. The Secretary of State is in charge of RPBs and issues or revokes orders recognising a RPB.⁶⁶ This power is important in regulation as the Secretary of State ensures 'adherence by RPBs to acceptable standards and control of its members.'⁶⁷ RPBs are independent bodies that make their own membership rules and regulations.⁶⁸ Nevertheless, the Secretary of State may only recognise a RPB that regulates, maintains and enforces rules that ensure that its members are not only fit and proper, but have the required education, practical training and experience.⁶⁹ In South Africa, professional bodies are yet to be accredited as they pertain to their members that practice as BRPs.

There are currently seven RPBs in the United Kingdom namely, the Law Society, the Law Society of Scotland, the Insolvency Practitioners Association, the Chartered Association of Certified Accountants, the Institute of Chartered Accountants in England and Wales, the Institute of Chartered Accountants in Ireland and the Institute of Chartered Accountants in Scotland.⁷⁰

A further restriction is that membership of an RPB does not qualify an individual to act as an insolvency practitioner. The individual must in addition be permitted to act as such in terms of the rules of his professional body. Members have to be permitted to act as insolvency

⁶⁵ Insolvency Act 1986, s390(2)(b)

⁶⁶ Loubser op cit note 43 at 128.

⁶⁷ Loubser op cit note 36 at 198.

⁶⁸ Note 57 above.

⁶⁹ Insolvency Act 1986, s391.

⁷⁰ Insolvency Practitioners (Recognised Professional Bodies) Order 1986 (SI 1986 No 1764).

practitioners in accordance with the rules and requirements of their RPBs⁷¹, which ensures RPBs set minimum requirements and standards for its members with regard to qualifications, training and experience before allowing them to act as insolvency practitioners. In South Africa, membership of a professional body automatically qualifies a member to apply for appointment as a BRP despite the fact that the professional body is not accredited nor does it have a system of monitoring the member for the specific purpose of business rescue practice.

The (binding) commitments made by RPBs to the Secretary of State can be found in a "Memorandum of Understanding".⁷² The Memorandum includes extensive obligations on the part of RPBs with regard to authorization; maintenance of authorization through monitoring; ethics and professional standing; complaints procedures; security and caution; disclosure and exchange of information; retention of records and reporting to the Secretary of State. The role players within the business rescue structure phenomenon in South Africa have no such binding agreement.

In addition, when an authorized insolvency practitioner of an RPB is expelled as its member, the member's authorization as an insolvency practitioner will be automatically revoked.⁷³

1.3.3 Authorisation by the Secretary of State

Individuals who are not members of any of the RPBs may also obtain authorisation to act as insolvency practitioners through application to the Secretary of State.⁷⁴ The Secretary of State may grant authorisation where the applicant appears to be fit and proper, and he meets the prescribed requirements with respect to education, practical training and experience.⁷⁵ The individual is only authorised for a specific period not exceeding the prescribed maximum, presently fixed at one year.⁷⁶ This authorisation must be automatically renewed by the Secretary of State unless it appears to it that the individual no

⁷¹ A Loubser op cit note 43 at 128.

⁷² Note 57.

⁷³ V Finch 'Insolvency practitioners: regulation and reform' (1998) *Journal of Business Law* 337.

⁷⁴ Section 390(2)(b).

⁷⁵ Insolvency Act 1986, s393(3A) read with regulation 8A of the Insolvency Practitioners Regulations, 2005 (SI 2005 No. 524) on education, practical training and experience.

⁷⁶ Insolvency Practitioners Regulations, 2009 (SI 2009 No. 3081) regulation 6 has reduced the previous three years that was found in regulation 10 of the Insolvency Practitioners Regulations, 2005 (SI 2005 No. 524)

longer complies with the requirements.⁷⁷ This authorisation may also be withdrawn earlier if the holder appears not to be a fit and proper person or fails to comply with any applicable provisions of the Insolvency Act, 1986.⁷⁸

1.3.4 The Joint Insolvency Examination

Prior to 1990, if an applicant had not in the past been authorised to act as an insolvency practitioner, he needed to have already passed the centrally organised Joint Insolvency Examination set by the Joint Insolvency Examination Board. However, as of 1990 all applicants wanting to be insolvency practitioners are required to pass this exam. Finch states in her article that 'this ensures the same standards of competence will be maintained by all the various authorising professional bodies'⁷⁹. The United Nations Commission on International Trade Law (UNCITRAL, hereafter referred to as the "*Legislative Guide*")⁸⁰ identifies examinations as one of four aspects of regulation that is essential, which is a standard that South Africa does not meet. The result is that there is no regulated uniformity in professional qualifications and standards.

1.3.5 The Insolvency Practitioners Regulations of 2005⁸¹

The Insolvency Practitioners Regulations of 2005 are in addition to the previous regulations on the grant and refusal of authorisation by the Secretary of State. The regulations give strict criteria to be considered with regards to an individual's character, qualifications and experience.

There are six factors considered by a competent authority before a person is found to be fit and proper to act as an insolvency practitioner, which requirements provide a benchmark against which to measure the honesty, integrity, fairness as well as the professional skills of individuals before they are authorised as an insolvency practitioner.⁸² Regulation 6(a)-(f) lists these factors as whether the applicant:

- a) has been convicted of an offence involving fraud or dishonesty;

⁷⁷ Insolvency Act 1986, s393(2) requirements.

⁷⁸ Insolvency Practitioners Regulations, 2005 (SI 2005 No. 524).

⁷⁹ Finch op cit note 73 at 336.

⁸⁰ The UNCITRAL Doc A/CN. 9/511 (hereafter "*Legislative Guide*"), par 40 at 175.

⁸¹ Insolvency Practitioners Regulations, 2005 (SI 2005 No. 524)

⁸² Loubser op cit note 43 at 128.

- b) has contravened any provision in any enactment of insolvency legislation;
- c) has engaged in deceitful, unfair or improper behaviour (whether unlawful or not) in his profession or employment;
- d) has failed to make full disclosure of a conflict of interest when acting as insolvency practitioner;
- e) has had adequate systems of control and accounting in place in any insolvency practice he carried on; and
- f) is or will be carrying on his insolvency practice with independence, integrity and appropriate professional skills.

Regulation 7 requires that an applicant who has never been authorised to act as an insolvency practitioner (whether by membership of a recognised body or by authorisation of the Secretary of State) must satisfy specific minimum requirements in terms of education, practical training and experience.⁸³ The applicant must have previous insolvency experience with a minimum number of hours or cases in a specific time period.⁸⁴

In terms of Regulation 8(2)⁸⁵ the requirement of previous experience for first time applicants are similarly applied to applicants who were previously authorised as insolvency practitioners. In addition, the completion of a specified minimum number of hours of continuing professional development is also a pre-requisite for second-time applicants.⁸⁶ Regulation 8(3) describes continuing professional development activities as attendance at seminars or courses, giving lectures, reading books or periodical publications and writing for publication. The lack of measurable outcomes for an examinable skills set requirement for South Africa's BRPs has a twofold effect. Besides the lack of uniformity in professional standards as stated above, introducing business rescue practice in institutions of learning in South Africa (which would develop skills in the profession and would advance the cause of PDIs) remains a challenge.

⁸³ Regulation 7(1)-(6) Insolvency Practitioners Regulations, 2005 (SI 2005 No. 524).

⁸⁴ Regulations 7(3) and (4) require that the applicant must have held office as insolvency practitioner (or in certain other prescribed capacities) in at least 30 cases during the immediately preceding ten years, or must have acquired at least 7000 hours of insolvency work (at least 1400 hours thereof in the immediately preceding two years). In the latter case, the applicant must also either have acted in one of the prescribed offices in at least five cases in the preceding five years, or have acquired 'higher insolvency work experience' (as defined) of at least 1000 hours or in specified combinations of number of cases and hours.

⁸⁵ Insolvency Practitioners Regulations, 2005 (SI 2005 No. 524).

⁸⁶ Insolvency Practitioners Regulations, 2005 (SI 2005 No. 524), regulation 8(2)(b).

1.3.6 Persons who are disqualified from appointment

A person is disqualified from appointment if at the time he is

- a) an undischarged bankrupt, or
- b) disqualified from being a director of a company

In terms of the Company Directors Disqualification Act 1986 (c46), a court may make an order of disqualification against a person, which means that for a specified period in the order that person shall not be a director of a company, shall not act as a receiver of a company's property or in any way, whether directly or indirectly, be concerned or take part in the promotion, formation or management of a company unless (in each case) he has the leave of the court⁸⁷, and he shall not act as an insolvency practitioner.⁸⁸ This order can be based on disqualification on conviction of an indictable offence,⁸⁹ on persistent breaches of companies legislation,⁹⁰ for fraud in a winding up,⁹¹ or

- c) is a mental patient or lacks capacity⁹²

Furthermore, if an individual acts as an insolvency practitioner without the necessary qualifications, he may be imprisoned, fined or both as this is an offence.⁹³

1.4 Powers and duties

1.4.1 General powers

The administrator has the following powers under Schedule 1 of the Enterprise Act:⁹⁴

1. An administrator is permitted to do anything necessary or expedient for the management of the affairs, business and property of the company.⁹⁵
2. The administrator may remove a director of the company and may appoint a director whether or not to fill a vacancy.⁹⁶

⁸⁷ Company Directors Disqualification Act 1986 s1(a).

⁸⁸ Company Directors Disqualification Act 1986 s1(b).

⁸⁹ Company Directors Disqualification Act 1986 s2.

⁹⁰ Company Directors Disqualification Act 1986 s3.

⁹¹ Company Directors Disqualification Act 1986 s4.

⁹² Insolvency Act 1986, s390(4).

⁹³ Insolvency Act 1986, s389(1).

⁹⁴ Paragraph 60 Schedule B1.

⁹⁵ Paragraph 59(1) Schedule B1.

3. The administrator may call a meeting of members or creditors of the company.⁹⁷
4. The administrator may apply to court for directions in connection with his functions.⁹⁸
5. The administrator's consent is needed by the company or an officer of the company that wishes to exercise a management power.⁹⁹

1.4.2 General duties

In performing his duties, the administrator has a general duty to perform his functions in the interests of the company's creditors as a whole.¹⁰⁰

An administrator's duties include:

- Upon his appointment, the administrator must take custody or control of all the property he thinks the company is so entitled.¹⁰¹ The administrator shall manage the company's affairs, business and property in accordance with the proposals approved during the initial creditors' meeting, any revision of these proposals made by him which he does not consider substantial, and any revision of his proposals approved (with or without modification) at the initial creditors' meeting.¹⁰² However, where the court gives directions to the administrator of a company with regards to its affairs, business or property, the administrator must comply with these directions.¹⁰³
- He is an officer of the court whether or not he is appointed by the court.¹⁰⁴
- The administrator also has a duty to act against misfeasance.
Paragraph 75 allows the court to examine the conduct of a person who is or purports to be an administrator or who has been or purported to be an administrator on application of the official receiver, the administrator, the liquidator,

⁹⁶ Paragraph 61 Schedule B1.

⁹⁷ Paragraph 62 Schedule B1.

⁹⁸ Paragraph 63 Schedule B1.

⁹⁹ Paragraph 64(1) Schedule B1.

¹⁰⁰ Enterprise Act 2002, para 3(2).

¹⁰¹ Enterprise Act 2002, para 67

¹⁰² Enterprise Act 2002, para 68(1)(a)-(c).

¹⁰³ Enterprise Act 2002, para 68(2).

¹⁰⁴ Enterprise Act 2002, para 5.

a creditor or a contributory of the company. The grounds¹⁰⁵ of such application must allege that the administrator has misapplied or retained money or other property of the company, or has become accountable for money or other property of the company, or has breached a fiduciary or other duty in relation to the company, or has been guilty of misfeasance. The court may order the administrator to repay, restore or account for money or property, or to pay interest, or to contribute a sum to the company's property by way of compensation for breach of duty of misfeasance.¹⁰⁶

- The administrator acts as the company's agent in exercising his functions under administration in Schedule B1.¹⁰⁷

1.5 Removal and Replacement

An administrator may be replaced where:

- he dies,
- he resigns,¹⁰⁸
- where he is removed from office by court order,¹⁰⁹
in terms of paragraph 91, only the creditors' committee, the company, its directors, one or more creditors or a co-administrator can make the application.
or
- where he ceases to be qualified to act as an insolvency practitioner in relation to the company.¹¹⁰ Where he ceases to be qualified to act as an insolvency practitioner, he must give notice to the person that appointed him (the court, a holder of a qualifying floating charge, a company or the directors of a company)¹¹¹, if he fails to do so without a reasonable excuse, this will be an offence.¹¹²

The administrator may be replaced by the person that appointed him, whether it be the court, the holder of a qualifying floating charge, the company or the directors of the

¹⁰⁵ Enterprise Act 2002, para 75(3)(a)-(d).

¹⁰⁶ Enterprise Act 2002, para 74(4)(a)-(c).

¹⁰⁷ Enterprise Act 2002, para 69.

¹⁰⁸ Enterprise Act 2002, para 87

¹⁰⁹ Enterprise Act 2002, para 88

¹¹⁰ Enterprise Act 2002, para 89

¹¹¹ Enterprise Act 2002, para 89(2)

¹¹² Enterprise Act 2002, para 89(3)

company.¹¹³ Loubser submits in her dissertation that permitting the person that appointed the practitioner the power to replace him 'ensures that an administrator who is failing to fulfil his duties properly can be removed without the expense and delay which would inevitably result if the court had to be approached for the removal. It should also remove the fear of directors of an ailing company that they may be handing over the management of the company to someone who is not capable of rescuing the company but can only be removed at great expense and with great difficulty.'¹¹⁴

When an administrator vacates office by resignation, death or otherwise, or is removed from office or because he no longer qualifies to act as an insolvency practitioner, he will not be personally liable for any action while acting as administrator.¹¹⁵ However, this discharge does not apply where the court exercises its powers in terms of misfeasance by an administrator (as stated in paragraph 1.4.2).¹¹⁶

1.6 Remuneration

In terms of paragraph 99(3), the administrator's remuneration and expenses shall be charged on and payable out of property of which he had custody or control immediately before he ceased to be administrator and shall be payable in priority to any security in terms paragraph 70.¹¹⁷ Insolvency practitioners must provide an estimate of their fees beforehand to creditors and if the practitioner wishes to increase the already agreed upon estimate, he must get approval from the creditors.¹¹⁸

¹¹³ Enterprise Act 2002, paras 91-95.

¹¹⁴ Loubser op cit note 36 at 201.

¹¹⁵ Enterprise Act 2002, para 98(1)

¹¹⁶ Enterprise Act 2002, paras 98(4) and 75.

¹¹⁷ Enterprise Act 2002, para 70(1) reads 'The administrator of a company may dispose of or take into action relating to property which is subject to a floating charge as if it were not subject to the charge.'

¹¹⁸ Explanatory Memorandum to the Insolvency (Amendment) Rules 2015, 2015 No. 4B, section 4.4, 4.5 and 4.6.

1.7 Further forms of regulation

1.7.1 The courts

The court may, amongst other wide relief,¹¹⁹ grant an order that regulates the administrator's exercise of his functions¹²⁰ or an order that the appointment of the administrator cease to have effect,¹²¹ where a creditor or a member of a company applies to court on the grounds that the administrator is acting or has acted unfairly so as to harm the interests of the creditor or member,¹²² or that the administrator proposes to act in a way that would unfairly harm the applicant's interests, or on the grounds that the administrator is not performing his functions as quickly or as efficiently as is reasonably practicable.¹²³

1.7.2 Bond of security

Insolvency practitioners are obliged to put up a bond of security as a form of insurance in the event that a practitioner acts fraudulently or dishonestly.¹²⁴

1.7.3 Monitoring

Monitoring visits by the Insolvency Service in England are stringent and are carried out in one of two ways. Firstly, insolvency practitioners are visited at least once every six years or more as considered necessary on behalf of the Secretary of State and the RPBs. The purpose of these visits is to ensure that insolvency practitioners abide by the legislation and accepted standards such as Statements of Insolvency Practice (SIPs)(guidance notes produced by the insolvency practitioners' trade associations and the Joint Insolvency Committee(JIC) , adopted by each of the RPBs, and which are issued to and are binding upon insolvency practitioners)¹²⁵, the Insolvency Code of Ethics and the relevant rules and regulations of the authorising bodies.¹²⁶ Secondly, these visits are carried out on each RPB at least once every three years to ensure that the RPB is adhering to the Memorandum of

¹¹⁹Enterprise Act 2002, para 74(3)-(4), for example dismiss the application, make an interim order, require the administrator to do or not to do a specified thing, make any other order it thinks appropriate.

¹²⁰ Enterprise Act 2002, para 74(4)(a)

¹²¹ Enterprise Act 2002, para 74(4)(d)

¹²² Enterprise Act 2002, para 74(1).

¹²³ Enterprise Act 2002, para 74(2)

¹²⁴Note 57.

¹²⁵ 'The Regulation of Insolvency Practitioners' Seminar by Gordon Stewart of Allen & Overy LLP 2010.

¹²⁶ Note 57.

Understanding (described in paragraph 1.3.2). An RPB's status may be revoked for failing to meet the requirements of the Memorandum of Understanding upon referral to the Secretary of State. The lack of monitoring of the skills and experience of BRPs in South Africa will be addressed in Chapter 3.

1.7.4 Complaints procedures

The Insolvency Service considers complaints about RPBs and accordingly investigates whether the RPB has correctly followed its own complaints procedures and whether these procedures are adequate.¹²⁷ RPBs are the sole bodies that handle complaints of the professional conduct of insolvency practitioners;¹²⁸ nevertheless, the power to confirm, reverse or modify a decision or action of an insolvency practitioner vests with the court, and not the Secretary of State, the Insolvency Service or the insolvency practitioner's RPB.¹²⁹

If the RPB upholds the complaint, it can confer any one of the following penalties; a fine, a restriction of the insolvency practitioner's license or a withdrawal of the license.¹³⁰ In the case of a complaint not being upheld and the complainant being unsatisfied, the RPB may refer the matter to an independent complaints reviewer.¹³¹ An insolvency practitioner authorised by the Secretary of State is subject to their license being withdrawn should a complaint be upheld by the Secretary of State.¹³²

1.7.5 Other principal bodies

- The Joint Insolvency Committee (JIC) consisting of representatives from each of the RPBs and the Insolvency Service discusses issues relating to insolvency practitioners by looking at 'professional and ethical standard setting with the goal of achieving consistency across the profession.'¹³³
- The Insolvency Practices Council (IPC) investigates and examines ethical and professional standards, presents proposals, makes recommendations to the relevant

¹²⁷ Note 57.

¹²⁸ Ibid.

¹²⁹ Ibid ; See also the Enterprise Act 2002, paras 74 and 75.

¹³⁰ Note 57.

¹³¹ Ibid .

¹³² Ibid.

¹³³ Ibid.

RPBs and considers whether standards are being adopted, observed and enforced.¹³⁴ It is funded by a levy on the RPBs who recover this from the licensing fee on their members.

- The Association of Business Recovery Professionals (known as R3) is the trade association for insolvency practitioners. Its purpose is the representation of members' views to the government and media, the rendering of advice to its members on insolvency law and practice, the organisation of courses, conferences and meetings in response to its members' continuing professional needs, and the collection and dissemination of statistics on corporate recovery and personal insolvency.¹³⁵
- Society for Professionals in Insolvency (SPI) is a trade association for lawyers and accountants comprising 80% of all insolvency professionals. It offers training, continuing professional education and ethical matters and issues guidance notes.¹³⁶

From a comparative perspective, South Africa's regulation of BRPs cannot be measured because of a lack of monitoring guidelines, procedures, policies and systems of accountability. The most distinguishing features of how monitoring and regulation of insolvency practitioners is applied is the Memorandum of Understanding between RPBs and the Secretary of State, and the SIPS.

The following two chapters will suggest that laws regulating the skills and experience of insolvency practitioners in England function well in practice because there are systems of required accountability to the State via the Insolvency Service and RPB's which are stringently monitored; and, that the regulation of BRP's in South Africa is inadequate, not for a lack of firm foundation in English laws, but for a lack of accountability, systems of monitoring, examinations and skills development.

¹³⁴ Note 57.

¹³⁵ Note 57.

¹³⁶ Finch op cit note 73 at 337.

CHAPTER 2

2.1 An historical overview of Business Rescue in South Africa

Previously, business rescue in South Africa was known as judicial management and those that administered it were called judicial managers. Judicial management was first introduced in South Africa through the Companies Act 46 of 1926 (hereafter the “1926 Act”).

It is necessary to locate the 1926 Act within the social and economic context in which it was birthed. 1926 was also the year in which the “1926 Mines and Works Amendment Act gave the government Labour Party its reward by establishing a statutory ‘colour bar,’ banning blacks from most well-paid jobs, and reversing previous court judgments that had declared this illegal.”¹³⁷

The report of the Economic and Wage Commissions in 1925 described the white community as being “enabled to maintain a standard of life approximating rather to that of America than to that of Europe in a country that is poorer than most of the countries of Central Europe, solely because they have at their disposal these masses of docile, low-paid native labourers.”¹³⁸ Given the context in which this Act came into being, it would be safe to assume that it did not at the time take into account the large majority population. Therefore it is an entirely ineffectual basis to build South Africa’s corporate insolvency laws upon.

The 1926 Act was replaced by the Companies Act 61 of 1973 (hereafter the “1973 Act”)¹³⁹ and provisions of judicial management went through minor changes.¹⁴⁰ By 1973 apartheid was the established form of governance in South Africa, black South Africans were not entitled to citizenship in South Africa and were deemed to belong to tribal homelands to which they had been allocated.¹⁴¹ At the same time, blacks “were indispensable economically, an even bigger problem...black labour was everywhere in white South Africa—on farms, construction sites, and shop floors.”¹⁴²

¹³⁷ F Welsh *A History of South Africa* (2000) 397.

¹³⁸ *Ibid* 401.

¹³⁹ Loubser *op cit* note 7 at 153.

¹⁴⁰ Bradstreet *op cit* note 5 at 196.

¹⁴¹ M MacDonald *Why Race Matters in South Africa* (2006) 49.

¹⁴² *Ibid*.

In the 1973 Act, there was a lack of legitimate regulation of judicial managers as 'no qualifications, academic or professional, no experience and no professional affiliation were required by law'.¹⁴³ Although s372 of the 1973 Act on disqualification for nomination or appointment as provisional or final liquidator of a company was also applicable to judicial managers, s381 of the of the 1973 Act only gave the Master powers to enquire into the conduct of liquidators to see if he was carrying out his duties and observing the law.¹⁴⁴ Furthermore, because there was no control of the qualifications and actions of insolvency practitioners, there was widespread fraud and incompetence which led to mistrust in the insolvency mechanisms.¹⁴⁵

However, not only was the global environment going through major changes and encouraging issues such as 'corporate governance, new standards of accountability, disclosure and transparency'¹⁴⁶, simultaneously during the 37 year existence of the 1973 Act, the South African socio-political landscape was also changing drastically.

Post 1994, many commentators described judicial management as a failure that was in need of reform or a complete overhaul.¹⁴⁷ Some of the numerous reasons for its failure as they relate to judicial managers, included that:

1. the Master of the High Court nominated and appointed the provisional and final judicial managers.¹⁴⁸ There were allegations of corruption in the appointment process. In addition, the Master was the supervisory body over rescue proceedings when in fact the Master is specialised in supervising the administration of deceased estates.¹⁴⁹

¹⁴³ Loubser op cit note 43 at 125.

¹⁴⁴ Loubser op cit note 43 at 124.

¹⁴⁵ Loubser op cit note 43 at 125.

¹⁴⁶ FHI Cassim...et al *Contemporary Company Law* 2 ed (2012) 3.

¹⁴⁷ See for example AH Olver 'Judicial Management-A Case for Law Reform' (1986) 49 TSAR 84; H Rajak & J Henning op cit note 4 at 267-268; DA Burdette 'Unified Insolvency Legislation in South Africa: Obstacles in the Path of the Unification Process' (1999) 32 *De Jure* 44 57; Loubser op cit note 7; Bradstreet op cit note 5 at 197.

¹⁴⁸ Companies Act 61 of 1973, s431(4).

¹⁴⁹ Loubser op cit note 7 at 161; See also Calitz op cit note 9 at 298-304 on criticisms of the Master acting as insolvency regulator.

2. liquidators were appointed as judicial managers,¹⁵⁰ even though liquidators are specialised in dismantling companies.¹⁵¹
3. there were no special or general qualifications required for appointment as a judicial manager, save for the person furnishing security for the proper function of his duties.¹⁵² The complete lack of any requirements meant that even incompetent practitioners were appointed. In addition, it was not compulsory for judicial managers to be members of a professional body, which led to them acting negligently and dishonestly.¹⁵³ However, the case of *Samuels v Nicholls & another*¹⁵⁴ indicates that a judicial manager can be removed where complete incompetence, mismanagement or dishonesty is found.

Rajak and Henning state in their article that 'the role of the judicial manager, despite being invested with considerable powers and apparently designed to carry out functions of considerable public and private significance, lacks statutory regulation laying down suitable provisions for qualification, competence and suitability.'¹⁵⁵

4. the same judicial manager could be appointed as liquidator of the same company where judicial management failed, which meant that judicial managers could be paid twice for fees therefore benefiting financially from a failed judicial management process.¹⁵⁶
5. judicial managers concentrated on paying creditors' claims and not on running the business, which meant that they preferred going the liquidation route in order to pay creditors.¹⁵⁷
6. remuneration payable to practitioners was heavily criticized because it was calculated as a percentage of the sale price of estate assets (a commission-based

¹⁵⁰ Burdette op cit note 147 at 57.

¹⁵¹ A Loubser 'The Insolvency Practitioner: Professional Status at Last?' (1999) 7(2) *Juta's Bus.L* 53; See also Bradstreet op cit note 5 at 207, where the author states that 'to appoint a liquidator as a business rescue practitioner may be compared to...appointing an executioner to act as a nurse or paramedic'.

¹⁵² Loubser op cit note 2 at 155.

¹⁵³ Loubser op cit note 2 at 156.

¹⁵⁴ 1948 (2) SA 255 (W).

¹⁵⁵ Rajak and Henning op cit note 4 at 268.

¹⁵⁶ Loubser op cit note 2 at 156.

¹⁵⁷ Rajak and Henning op cit note 4 at 267.

system) according to a predetermined tariff which meant that practitioners appointed to large estates received a huge pay-out.¹⁵⁸

As it can be deduced from the above, there was a need for drastic regulation of business rescue practitioners to ensure that the business rescue process did not fail. The proper regulation of business rescue practitioners prevents fraudulent and corrupt activities by them and leads to public trust in insolvency practitioners which inadvertently leads to trust in insolvency procedures. Also, by requiring a person to have the necessary qualifications and to be closely supervised by an official body, shareholders and directors will be persuaded to hand over management control to an independent person.¹⁵⁹ At the same time South Africa's unique context requires reflection. Josman J, on the need to amend the 1973 Act, in *Le Roux Hotel management (Pty) Ltd & another v E Rand (Pty) Ltd (FBC Fidelity Bank Ltd (Under Curatorship), Intervening)*¹⁶⁰ held that,

'If a business rescue regime is to be enacted in South Africa it will require a consideration of the special requirements of [G] the South African economy by comparison with those described above, and this clearly contemplates legislative intervention that can survey the matter and reach a conclusion as to what is best for this country. For me, sitting as a Judge trying to regenerate a system which has barely worked since its initiation in 1926, would not only be inappropriate but would also require me to disregard the body of precedent that has [H] been established incorporating a very conservative approach to judicial management.'

2.2 The Business Rescue Practitioner under the Companies Act

The Companies Act, while attending to the flaws of the 1973 Act created a new 'phenomenon'¹⁶¹ of the business rescue practitioner. Before the introduction of the Companies Act, 'there was debate on whether business rescue practitioners should be taken from the existing ranks of insolvency practitioners or whether a whole new profession

¹⁵⁸ DA Burdette 'Some initial thoughts on the development of a modern and effective business rescue model for South Africa(Part 2)' (2004) 16 *SA Merc LJ* 433

¹⁵⁹ Loubser op cit note 43 at 137.

¹⁶⁰ 2001 (2) SA 727 (C) at para 60.

¹⁶¹ M Pretorius 'Tasks and activities of the business rescue practitioner: a strategy as practice approach' (2013) 17(3) *Southern African Business Review* 2.

should be created'.¹⁶² Government decided to create a whole new profession that needed to be regulated in the Act and the Regulations,¹⁶³ and effectively the BRP profession is regulated in so far as only practitioners licensed by the Companies and Intellectual Property Commission (hereafter "the Commission") may be appointed.¹⁶⁴ The fact that a new profession was created means that a new professional body that regulates its members must also be formed.¹⁶⁵ A new profession was created to possibly address two issues- the development of newly skilled individuals and to encourage capacity for a wider reach.

The Act defines a 'business rescue practitioner' as a:

'person appointed, or two or more persons appointed jointly, in terms of this Chapter to oversee a company during business rescue proceedings...'¹⁶⁶

As the persons that administer business rescue, BRPs have an important job which is to revive a failed or failing company. When they are appointed, they take control of the company in the same way that a director controls the day to day affairs of a company. Therefore, a BRP's credibility is significant because the effectiveness and or success of the rescue depends largely on their competence (education and experience) and ethical conduct. In addition, good credibility of the persons that administer business rescue will help do away with the stigma that business rescue is 'merely another route to liquidation, and the beginning of the end.'¹⁶⁷ The large degree of power afforded a BRP necessitates some measure of control over who is appointed.¹⁶⁸ Business rescue will have credibility if the 'persons appointed are professional, accountable and effective.'¹⁶⁹

The initial 2009 draft of the current Companies Regulations 2010 recommended the creation of a Business Rescue Regulatory Board that would function as an organ of state

¹⁶²PM Meskin *Insolvency law and its operation in winding-up* PAM Magid, A Borraine, JA Kunst & DA Burdette (eds) (loose leaf from 1990), 19, Service Issue 47, December 2016, updated to November 2016, para 18.14.1.

¹⁶³ Ibid, para 18.14.1; See also Rajak & Henning op cit note 4 at 282-285, where in looking at the USA and UK positions, authors consider various ways of introducing the business rescue practitioner profession in South Africa. This article was presented at a symposium held at Proforum (Transvaal Law Society) on 23rd October 1998 that discussed the Draft Bankruptcy Bill.

¹⁶⁴ Companies Act 71 of 2008(hereafter "Companies Act"), s138 (1)(b).

¹⁶⁵ R Papaya 'Are business rescue practitioners adequately regulated?' December 2013 *De Rebus* 30.

¹⁶⁶ Companies Act 71 of 2008, s128(1)(d).

¹⁶⁷ Loubser op cit note 7 at 169.

¹⁶⁸ Bradstreet op cit note 5 at 209.

¹⁶⁹ Burdette op cit note 158 at 435.

under public administration and as an institution outside of public service whose aims would be to regulate the practice of BRPs by advising the Minister of Trade and Industry on aspects such as qualifications, licensing, and receiving and resolving complaints against BRPs.¹⁷⁰

However, this recommendation was not introduced into the next draft of the 2010 Companies Regulations.

The Commission is the regulatory body appointed by the Minister¹⁷¹ of the Department of Trade and Industry (DTI) to regulate the practice of BRPs in South Africa; therefore, as the institution in charge of the regulation of BRPs it ought to play a vital role in the effectiveness and efficiency of insolvency law.¹⁷² Although our policies and laws provide for this, in practice it is difficult because the Commission's main function is to register companies and intellectual property. The powers afforded it by Chapter 6 of the 2008 Act are considerably weakened by the absence of monitoring processes and transparent accountability to the DTI, the non-accreditation of professional bodies and the lack of its own specific code of conduct or a set of professional standards by which to regulate and develop the profession of BRPs which could be an equivalent to the Memorandum of Understanding between the Insolvency Service and RPBs in England.

¹⁷⁰ Bradstreet, R 'Business rescue practitioners: What role for the legal profession' 2012 July *De Rebus* 22

¹⁷¹ Companies Act, 138(2).

¹⁷² Calitz op cit note 9 at 309.

CHAPTER 3

THE BUSINESS RESCUE PRACTITIONER

'.....the success of any insolvency system depends on those who administered it: if they did not have the respect of and confidence of the courts, the creditors, the debtors and the general public, the insolvency would fall into disrepute and disuse.'¹⁷³

Business rescue proceedings may be commenced in one of two ways, namely by resolution of the company board where it has reasonable grounds to believe that the company is financially distressed and there is a reasonable prospect of rescuing the company¹⁷⁴, or by an affected person filing an application to court, at any time, for an order placing a company under supervision and commencing business rescue proceedings.¹⁷⁵ Section 128(1)(a) of the Act describes an affected person as a shareholder, a creditor, a registered trade union, an employee or this employee's representatives.

3.1 Appointment of Business Rescue Practitioners

3.1.1 Appointment by company resolution

The Companies Act states that within five days of adopting and filing its resolution to begin business rescue, or such time that The Commission may allow, a company must appoint a practitioner who satisfies the requirements set out in section 138(set out hereunder in paragraph 3.2.1) of the Companies Act and who accepts such appointment in writing.¹⁷⁶ After making the appointment, the company must within two business days file the notice of appointment and it must publish a copy of the notice to each affected person within five business days of filing the notice.¹⁷⁷ Where a company fails to adhere to these time frames of the notice, s129(5)(a) and (b) state that the resolution of the company to commence business rescue proceedings will be a nullity and the company may not file another resolution to commence business rescue proceedings for a further three month period, unless the court approves the filing of a further resolution on good cause shown.

3.1.2 Appointment by application of court order

¹⁷³ The Cork Report para 732.

¹⁷⁴ Companies Act, s129(1)(a) and (b).

¹⁷⁵ Companies Act, s131(1).

¹⁷⁶ Companies Act, s129 (3)(b).

¹⁷⁷ Companies Act, s129 (4)(a)-(b).

Where an affected person files a court order to begin business rescue proceedings,¹⁷⁸ the court may make an order appointing an interim BRP who is nominated by that affected person,¹⁷⁹ subject to ratification of the appointment by the holders of a majority of the independent creditors' voting interests at the first meeting of creditors.¹⁸⁰ Section 128(1)(a) of the Act describes an affected person as a registered trade union representing employees of the company or if any of the employees of the company not represented by a registered trade union, each of those employees or their representatives.

With regard to trade unions and the informal economy, the International Labour Organization 2003 Expanded Statistical Definition differentiates between two types of informal economy; informal self-employment (employers in informal enterprises) and the informal wage employment (employees hired without social protection contributions by formal or informal enterprises or as paid domestic workers by households).¹⁸¹ This means that employees in informal-wage employment who are under a formal enterprise are non-unionized and therefore have little practical recourse to business rescue. Transport and municipal workers form a significant number of this category of employee in South Africa. Unions represent workers interests and as a functional organism is far more enabled than a single employee who faces significant challenges, financial and otherwise, to enforce worker rights.

3.2 Qualifications

This is the most important method of regulation of business rescue practitioners. It is vital for a BRP to have qualities of integrity and impartiality, and the necessary professional and practical experience.¹⁸² Bradstreet in his article states that 'the qualifications of a practitioner ought to serve as a safeguard against problems arising due to his inability.'¹⁸³ Bradstreet in effect implies an expectation of problems arising from the complex nature of the job because 'ability' in this instance is abstract.

¹⁷⁸ Companies Act, s131(1).

¹⁷⁹ Companies Act, s131(5).

¹⁸⁰ Companies Act, s131(5) and s147(1).

¹⁸¹ South African Local Government Association 'Informal economy' available at <http://led.co.za/topic/informal-economy> accessed on 30 Jan 2017.

¹⁸² Cassim...et al op cit note 146 at 889.

¹⁸³ Bradstreet op cit note 5 at 211.

Together with the provisions set out in s138(1)(a) to (f) of the Companies Act, section 138(3)(a) gives the Minister powers to make regulations dealing with the standards and procedures to be followed by the Commission in carrying out its licensing functions and powers in s138, and the minimum qualifications for a person to practice as a BRP, including different minimum qualifications for different categories of companies.¹⁸⁴

The current database of BRPs on the Commission website is comprised of 218 licensed BRPs.¹⁸⁵ The lack of capacity in modern day South Africa as well as the fact that there is no policy or plan being created or implemented to expand or grow this profession in a manner that would serve the needs of its wider (PDI) population is problematic considering that in the 35 year period from the 1973 Act to the 2008 Companies Act, black South Africans went from being non citizens and cheap labour to active voting citizens, and the sector of the population upon whom the current dispensation has placed the entrepreneurial onus to remedy to the country's grossly high unemployment rate, and who largely make up the informal sector.

3.2.1 Qualifications under the Companies Act

Section 138(1)(a)-(f) of the Companies Act lists the qualifications that a BRP must have. An individual will only be appointed if he:

- a) is a member in good standing of a legal, accounting or business management profession accredited by the Commission;
- b) is licensed as a business rescue practitioner by the Commission in terms of s138(2);
- c) is not subject to an order of probation(while serving as a director or within any period of 10 years after the effective date of probation);
- d) would not be disqualified from holding office as a director (same disqualifications as a director of a company);
- e) does not have any other relationship with the company such as would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of that person is compromised by that relationship;
- f) is not related to a person who has a relationship contemplated in paragraph (e).

¹⁸⁴ Companies Act, s138(3)(b).

¹⁸⁵ Note 22.

The chapter will proceed with an analysis of each point.

3.2.1.1 Person a member of a professional body accredited by the Commission s138(1)(a)

There are various professional bodies in South Africa which are required by the Act to regulate their members who in turn can be appointed as BRPs by the Commission. The legal profession is regulated by the Law Society of South Africa (LSSA) which comprises of four law societies; the KwaZulu Natal Law Society, Law Society of the Northern Provinces, the Cape Law Society and the Law Society of the Free State. The South African Institute of Chartered Accountants (SAICA) regulates the accounting profession. Business management professionals are regulated by the Turnaround Management Association, Southern Africa (TMA-SA)¹⁸⁶

Even though the Act requires that a person has to be a member in good standing of his relevant professional body, Bradstreet submits that this requirement is ambiguous because mere membership in good standing does not guarantee a successful rescue, “unless such membership necessarily attests to such an ability”.¹⁸⁷ Considering that these bodies attest to the membership in good standing and the abilities of their members in a specific profession, it would be disadvantageous to these bodies to be accredited by the commission. A BRP should ideally have abilities in the fields of law, accounting and management in order to effect a successful rescue. If the Commission was to accredit these professional bodies, by default these bodies would be attesting to the membership in good standing and abilities of their members not only in the specific field of that profession but in also the newly created profession of BRPs.

Should the court find a member of one of these bodies, in the execution of their duties as a business rescue practitioner, to have been grossly negligent, the body would then be placed in a position in which they have to find that member to no longer be in good standing; and this based on an Act and a Commission that has created and is meant to regulate a wholly

¹⁸⁶ The TMA-SA is a global organisation that has a presence in Southern Africa. It is made up of professionals (certified turnaround professionals and business rescue practitioners) that have experience in law, accountancy and turnaround management, available at <http://www.tma-sa.com/certification.html> accessed on 18 Feb 2017.

¹⁸⁷ Bradstreet op cit note 5 at 205.

new profession that requires the skills of all three professions but which is lacking its own professional body. This presents an ethical dilemma for the professional body who regulates its members according to complex and yet specific codes of conduct in that specific field. Viewed from this perspective, it is logical to conclude that these professional bodies have no obligation, legal or otherwise, to inform the Commission of whether a member has been found to be grossly negligent in the performance of his duties as a BRP considering that none of these professional bodies have any code of conduct specifically designed to regulate or monitor the profession of BRPs such as England's Memorandum of Understanding.

Bradstreet further submits that creditors cannot depend on the requirement of membership in good standing to deduce that the practitioner will act in their best interests without having any knowledge of the BRP's personal qualifications, as this requirement only "reassures the creditor of the BRP's trustworthiness (s138(1)(b) and (c)) and the unlikelihood of a conflict of interests(s138(1)(d) and (e))".¹⁸⁸ Papaya concurs with the criticism of this provision and proposes that in order for the regulation of BRPs to be effective, the relationship between the Commission and the professional bodies needs to be at least properly defined.¹⁸⁹ This is especially applicable in the context of the profession lacking its own professional body.

Even though a person must be a member of a legal, accounting or business management profession, persons who are not members of either profession, for example insolvency practitioners, may also apply¹⁹⁰ to the Commission for a license. The Commission may grant such a license if is satisfied that the person is of good character and integrity,¹⁹¹ and that his education and experience are sufficient to equip him to act as a business rescue practitioner.¹⁹²

Loubser in her 2007 article which precludes the Companies Act suggests that 'previously disadvantaged persons in South Africa [who] need to have their entry into the insolvency

¹⁸⁸Bradstreet op cit note 5 at 205.

¹⁸⁹Papaya op cit note 165 at 30.

¹⁹⁰ Companies Regulations 2011 No.34239, reg 126(2). Application is made to the Commission via Form CoR 126.1 together with a payment listed in Table CR 1.

¹⁹¹ Companies Regulations 2011, reg 126(4)(a). However, the regulations do not state what constitutes "good character and integrity"

¹⁹² The Companies Regulations, reg 126(4)(b).

profession facilitated'.¹⁹³ Further, Loubser suggests that 'suddenly imposing high professional and academic qualifications will exclude many members of this group'. Regulation 126(2) of The Companies Regulations 2011 caters for the inclusion of PDIs but conversely presents a challenge with regard to skills.¹⁹⁴ Loubser proposes that "South Africa therefore has to devise a regulatory system that is suited to our unique situation where elements of both developed and emerging market economies are present. It is submitted that the most effective regulation would be a tiered system, under which a higher degree of regulation, with regard to both qualifications and practical experience, would be required for more complex cases, while a minimum standard would be set for small and fairly straightforward ones."¹⁹⁵

Despite the Act's requirement of accreditation of a professional body by the Commission, the Commission has not yet accredited any of the professional bodies in South Africa. This equates to, as previously pointed out, the non-obligation by the Commission and the professional bodies to not inform each other of a BRP acting grossly negligent or no longer being in good standing with the profession, respectively.

Reasons that have been cited for the non-accreditation of any of the professional bodies is that none of the professional bodies encompass knowledge in the areas of law, accounting and business management.¹⁹⁶ Nevertheless, regulation 126(1)(a) states that when the Commission is considering an application for the accreditation of a profession under s138(1), it must look at the qualifications and experience set as conditions for membership of that profession and the ability of that profession to discipline its members. Regulation 126(1)(a) also gives the Commission power to revoke this accreditation if it has reasonable grounds to believe that the profession is no longer able to properly monitor or discipline its members. Effectively, the Commission has similar powers of accreditation and revocation of accreditation of professional bodies as the Secretary of State, but without a point of reference or binding agreement such as the Memorandum of Understanding.

3.2.1.2 Person is licensed as a Business Rescue Practitioner by the Commission s138(1)(b)

¹⁹³ Loubser op cit note 43 at 138.

¹⁹⁴ Note 190.

¹⁹⁵ Loubser op cit note 43 at 138.

¹⁹⁶ Meskin op cit note 162 at para 18.14.2.

The person must be licensed by the Commission in order to qualify as a BRP. However, not only members of professional bodies may be licensed, but individuals also (as stated in paragraph 3.2.1.1). Licenses given by the Commission are conditional and not general.¹⁹⁷ They are given on a case-by-case basis. This is an important aspect of regulation of BRPs because it is specific to each company that the BRP takes on and not merely a general license, as each company is different, therefore requiring different levels of skills of the BRP. This prevents a BRP from taking whatever rescue he pleases as it ensures that he is best suited for that particular rescue. The disadvantage however is that there may be a failure to meet the time frames set under s129(3) and (4) (five day period stated in paragraph 3.1.1) in business rescues commenced through company resolution as an applicant applying to be a BRP for the first time may be time-consuming.¹⁹⁸

A strict time limit is exclusionary because it disadvantages some BRPs. Loubser proposes that when a company files a resolution placing itself into business rescue and expects a delay in the appointment of a BRP, an application should be made for an extension of the five day period in terms of s129(3) as a resolution, once lapsed, may not be resurrected.¹⁹⁹ Furthermore, Regulation 127(1)(b) allows the Commission to impose any other restrictive conditions on the conditional licensing, thereby placing more difficulty on new BRPs that are wanting to enter the sphere.

3.2.1.3 Person is not subject to an order of probation s138(1)(c)

The Commission may not issue a license to a person who is disqualified from appointment as a BRP because he is subject to an order of probation in terms of s162(7) of the Companies Act. This provision emphasizes the importance of a practitioner having integrity.

3.2.1.4 Person would not be disqualified from acting as a director of a company s138(1)(d)

¹⁹⁷ Regulation 126(6)(b).

¹⁹⁸ See also *Advanced Technologies and Engineering Company (Pty) Ltd (in business rescue) v Aeronautique et Technologies and Others*, unreported, 6 June 2012 (GNP) (unreported case no 72522/11)

¹⁹⁹ *Advanced Technologies and Engineering Company (Pty) Ltd (in business rescue)* supra talks of resolutions lapsing and not being able to be resurrected.

Regulation 126(5) states that the Commission may not issue a license to a person if they would be disqualified from acting as a director in terms of s69(8) of the Companies Act.²⁰⁰ Section 69(8) states that a person is disqualified from being a director of a company where the court has declared the person a delinquent, the person is an unrehabilitated insolvent, the person has been removed from an office of trust on the grounds of misconduct involving dishonesty, the person has been convicted and imprisoned for an offence in South Africa or another country.

3.2.1.5 Person does not have a relationship with the company s138(1)(e)

An applicant must not have a relationship with a company that would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of that person is compromised. This ensures that the BRP acts with independence and impartiality.²⁰¹

However, the court in *Copper Sunset Trading 220 (Pty) Ltd v Spar Group Ltd and Another*²⁰² stated that where no objections are raised to a person's appointment as a BRP in the creditors' meetings and where a party has not shown in its papers that the integrity, impartiality or objectivity has been compromised, the mere fact that the BRP acted as the attorney of record of the company before business rescue proceedings does not preclude him from being appointed as its BRP.

3.2.1.6 Person is not related to a person who has a relationship contemplated in s138(1)(d), s138(1)(f)

An applicant must not be related to a person who has a relationship contemplated in s138(1)(d) above.

3.2.2 Minimum qualifications under the Companies Regulations 2011

²⁰⁰ See further Regulation 126(7)(a) which states that where a person is licensed and subsequently becomes disqualified from appointment as a business rescue practitioner because of s138(1)(c) or (d), the Commission must give a written notice revoking the license and Regulation 127(b) which states that where the Commission has reasonable grounds to believe that a person is no longer qualified to be licensed or has contravened the conditions of the license, it may suspend or revoke such license.

²⁰¹ Meskin op cit note 162 at para 18.14.2.

²⁰² 2014 (6) SA 214 (LP), at paras 20 and 24.

In accordance with s138(3)(b), the Minister has made regulations dealing with minimum qualifications for a person to practice as a BRP and different minimum qualifications for different categories of companies that a BRP needs to possess.

Regulation 127²⁰³ of the Companies Regulations distinguishes between junior, experienced and senior practitioners, and between large, medium and small companies depending on their public interest score. The size of the company that the BRP will be appointed depends on the category that he falls into.²⁰⁴ This is a vital regulation because it goes without saying that the size of a company is directly linked to how much skill the BRP must possess. For example, large companies will require a complex rescue which in turn requires a high level of skill.

A junior BRP with no previous experience or experience in business turn around or rescue practice of less than five years may be appointed as a BRP for a small company, other than a state-owned company, that has a public interest score below 100 (therefore excludes medium or large companies). However, he may be appointed as an assistant to an experienced or senior BRP²⁰⁵

An experienced BRP, who has at least five years experience may be appointed for a small or medium company (a public company with a public interest score less than 500), but not for a large company or for a state owned company with a public interest score between 100 and below 500 points, unless as an assistant to a senior BRP.²⁰⁶

A senior BRP, with at least ten years experience in business turn around as a BRP in terms of the Companies Act may be appointed as a BRP for any type of company; small, medium or large (company other than a state-owned company, with a public interest score of 500 or more).²⁰⁷

²⁰³ The Companies Regulations 2011 No.34239, reg 127(1)-(4). The Commission's website has a register of licensed business rescue practitioners in South Africa and the category he or she falls into i.e. junior, experienced or senior.

²⁰⁴ Meskin op cit note 162 at para 18.14.2.2.

²⁰⁵ Regulation 127(3)(a) and (b) read with Reg 127(2)(c)(iii) and Reg 127(2)(b)(iii).

²⁰⁶ Regulation 127(4)(a) and (b) read with Reg 127(2)(c)(ii) and Reg 127(2)(b)(ii)

²⁰⁷ Regulation 127(5) read with reg 127(2)(c)(i).h

Not having a blanket qualification for all BRPs ensures that costs are saved as a tiered system recognises the different degrees of qualifications and experience needed for a certain size of a company. Nevertheless, qualifications in this tiered system are merely based on experience and not on any examinable academic set of qualifications, a weakness in South Africa's regulation of the skills and experience of BRPs, as has been pointed out in Chapter one.

3.3 Powers and duties

In his management of company affairs and assets in order to rescue a company, the powers of a BRP are far-reaching.²⁰⁸

3.3.1 Section 140 General powers and duties

This section gives the BRP broad powers and responsibilities. The BRP, in addition to any other specific powers, duties and functions set out in Chapter 6 of the Companies Act

- has full management control of the company in place of its board and pre-existing management and can appoint outsiders such as advisors, valuers and auctioneers. As aforementioned, there are only 218 licensed BRPs listed on the Commission's website which is indicative of a skills shortage in the business rescue profession itself. Compounding the skills deficit is the fact that a limited number of practitioners results in the likelihood of the utilisation of a limited network of people appointed in associated skills.
- may delegate any of his powers or functions to a person who was part of the board or pre-existing management of the company. These persons know the structure of the company and therefore they have the operational skills.
- may remove from office any person who forms part of the pre-existing management of the company or appoint a person as part of the management of a company, whether to fill a vacancy or not. A BRP may not appoint a person as part of the management of the company or an advisor to the company or to the BRP without approval by the court.²⁰⁹ Furthermore, the BRP may not appoint a person that has any other relationship with the company that would lead a reasonable and

²⁰⁸ Cassim...et al op cit note 146 at 893.

²⁰⁹ Companies Act, s140(2).

informed third party to conclude that the integrity, impartiality, or objectivity of that person is compromised by that relationship.²¹⁰ In addition, this person must not be related to a person that has such a relationship with the company.²¹¹

- is responsible for developing a business rescue plan to be considered by the affected persons and implementing any such plan that has been adopted.
- is an officer of the court. Since he is an officer of the court during the rescue proceedings, he has the duty to report to the court with regards to any rules of or orders of the court.²¹² This increases his independence.
- has the same responsibilities, duties and liabilities as a director.
- is a pseudo-director and protects the interests of all affected persons. The role of pseudo-director incorporating as it does the responsibility of taking into account the interests of all affected persons is an impractical task for the handful of individuals who qualify as BRPs under the Act and cannot possibly address the needs of South Africa's national economy or socio-political stability implied in this subcategory of the general powers and duties of the practitioner.

Affected persons constitute a complex category in the South African socio-political landscape. Loubser's assertion of the importance of business rescue incorporates a wider definition of "community".²¹³ The categories of "all affected persons" and "community" are undermined by the lack of interest in growing the profession and the lack of proper regulation of the skills and experience of BRPs by a legitimate recognised professional body that is enabled to undertake and oversee business rescue practice in a manner that incorporates, in a practical sense, South Africa's PDIs and communities.

The BRP has the same responsibilities, duties and liabilities²¹⁴ of a director of a company with regards to section 75(directors' personal financial interest), section

²¹⁰ Companies Act, s140(2)(a).

²¹¹ Companies Act, s140(2)(b).

²¹² Companies Act, s140(3)(a).

²¹³ Loubser op cit note 2 at 137.

²¹⁴ Companies Act 2008, s140(3)(b).

76(standards of directors conduct) and section 77(liability of directors and prescribed officers). Rushford, in his article on the critical analysis of the business rescue regime, points out that the powers and duties of a BRP are burdensome by stating that 'subjecting a business rescue practitioner to the same duties as directors in this way seems fairly onerous, as he must also comply with the duties which apply expressly to practitioners.'²¹⁵ If the requirements to fulfil all powers and duties are implied to be excessive even for those who qualify under the Act, it raises the question of how skills and capacity may be developed among the previously disadvantaged population that may want to become BRPs. A separate professional body would not only regulate BRPs but also be responsible for the development of skills.

A BRP will not be liable for any act or omission in good faith in the course of the exercise of the powers and performance of his functions as practitioner.²¹⁶ However, a BRP may be liable for any act or omission amounting to gross negligence in the exercise of the powers and performance of his functions as practitioner.²¹⁷ In essence, BRPs are a law unto themselves until they have been found to be grossly negligent. This is disadvantageous to all stakeholders and in particular affected persons as they may extend to PDIs.

3.3.2 Other powers and duties

3.3.2.1 Notice to relevant authorities s140(1A)

The BRP must as soon as possible after being appointed, inform all the relevant regulatory authorities having authority in respect of the activities of the company, of the fact that the company has been placed under business rescue and of his appointment.²¹⁸

3.3.2.2 Security

²¹⁵ J Rushworth 'A critical analysis of the business rescue regime in the Companies Act 71 of 2008' 2010 *Acta Juridica* 393.

²¹⁶ Companies Act, s140(3)(c)(i).

²¹⁷ Companies Act, s140(3)(c)(ii).

²¹⁸ Companies Act 2008, s140(1A).

In general, BRPs do not need to provide security for the proper execution of their duties where a compulsory business rescue application is brought to court by an affected person in terms of s131.²¹⁹ Section 130(1)(c) states that an affected person may at any time after the adoption of a business rescue resolution of a company to commence business rescue proceedings, and up until the adoption of a business rescue plan in terms of s152, apply to court for an order requiring the BRP to provide security in an amount and on terms and conditions that the court considers necessary to secure the interests of the company and any affected party. This section implies that only a BRP who has been nominated by the board in terms of a company resolution to commence business rescue proceedings can be required by court to furnish security.²²⁰ A practitioner is not obliged to furnish security for the proper performance of his duties unless an affected person brings such an application to court.²²¹

3.3.2.3 The same Business Rescue Practitioner being appointed as liquidator

Section 140(4) states that if the business rescue proceedings conclude that the company must be placed in liquidation, that BRP of the company may not be appointed as the liquidator. This avoids conflict between the two different duties of a BRP and a liquidator, and allows a liquidator to challenge any negligent actions of that BRP.²²² Furthermore this prevents the issue of double-pay which was one of the failures of judicial management (as mentioned in paragraph 2.1).

3.4 Removal and Replacement

3.4.1 Removal

A BRP may only be removed from office by an order of court. Although going to court may be costly, the competence must be assessed objectively by a court because if it is made by

²¹⁹ Meskin op cit note 162 at para 18.4.2.3.

²²⁰ Meskin op cit note 162 para 18.4.2.3.

²²¹ Meskin op cit note 162 para 18.4.2.3.

²²² Rushworth op cit note 215 at 393.

the affected persons, this may lead to a 'corporate coup d'etat or an internal stalemate'²²³ or even fraud and corruption.

There are two ways that a BRP may be removed.²²⁴ Firstly, through s130(1)(b) of the Companies Act which allows an affected person to object to the appointment of the practitioner, after a business rescue resolution has been adopted but prior to the adoption of a rescue plan, on the basis that the BRP is not qualified in terms s138 (see paragraph 3.2.1) or is not independent of the company or its management or lacks the necessary skills having regard to the company's circumstances.

Secondly, an affected person or a court on its own motion may remove a BRP in terms of s139(2)(a)-(f), which states that a court may remove a BRP where the practitioner:

- a) is incompetent or fails to perform the duties of a BRP of the particular company; Section 139 does not state what "incompetence" entails. Perhaps this is advantageous because not having a closed list ensures that each case is based on its own merits. For example, in *African Banking Corporation Ltd v Kariba Furniture Manufacturers (Pty) Ltd*, the court held that the BRP's actions of not acting impartially or independently, and having disregard for the seriousness of the office he held amounted to deliberate grossly improper conduct.²²⁵

Bradstreet submits that rather than placing a threshold of gross negligence in his actions as a "director", a lower threshold of an ordinary skilled insolvency practitioner would be more beneficial as it would prevent him from taking a "cowboy approach in any area where he may not be subject to the restrictions placed on directors."²²⁶ In fact, the reasonably skilled practitioner was the test used in England prior to the amendments of the English insolvency laws by the Enterprise Act.²²⁷

Given that BRPs are given extensive powers, gross negligence as a benchmark for holding them liable is wrong. In terms of ethics, new practitioners are bound to

²²³Bradstreet op cit note 5 at 212.

²²⁴ Companies Act, s130 and s139.

²²⁵ (2015) 3 All SA 10 (SCA) at paras 37-38.

²²⁶Bradstreet op cit note 5 at 209.

²²⁷ *Re Charnley Davies Ltd* (1990) BCC 605

ethics of their professional bodies but this may not spill into their implementation of business rescue. There must be lower thresholds to enable BRPs to be bound ethically. Evans, Loubser and Van der Linde²²⁸ in their article on the Draft Insolvency Bill of 1996²²⁹ suggested that a single regulator of all professional bodies would at least 'set a high standard of ethical and professional conduct' that its members would have to adhere to.

- b) fails to exercise the proper degree of care in the performance of his functions; Chapter 6 does not define what is meant by "proper degree of care". Perhaps the court will look at the fact that the BRP is an officer of the court²³⁰ and that he has the responsibilities, duties and liabilities of a director under sections 75, 76 and 77²³¹ to see if the BRP has exercised a proper degree of care. However, this still does not detract from the fact that the BRP is given free reign until he is found to be grossly negligent.
- c) engages in illegal acts or conduct;
- d) no longer satisfies the qualifications and requirements of a BRP as set out in s138(1) (see paragraph 3.2.1)
- e) has a conflict of interest or a lack of independence; or
- f) is incapacitated and unable to perform the functions of his or her office without the likelihood of regaining that capacity within a reasonable time.

This section indicates that affected parties are inadvertently given powers to regulate BRPs by allowing them to remove an appointed practitioner. This however is ineffectual in practice because affected persons may not even be aware of business rescue.²³²

Meskin points out that no provision has been made for a copy of the s139(2) court removal order (if granted) to be forwarded to the Commission for it to consider suspending or revoking the BRP's license.²³³ As mentioned before, a professional body is not obliged by a

²²⁸ R Evans, A Loubser, K van der Linde 'Aspects of the Draft Insolvency Bill' (1999) 11 *SA Merc LJ* 223.

²²⁹ The South African Law Commission (Project 63) *Review of the Law of Insolvency: Draft Insolvency Bill and Explanatory Memorandum* (1996).

²³⁰ Companies Act 2008, s140(3)(a)

²³¹ Companies Act 2008, s140(3)(b).

²³² I Le Roux and K Duncan 'The naked truth: creditor understanding of business rescue: A small business perspective' (2013) 6 *The Southern African Journal of Entrepreneurship and Small Business Management* at 64-65 indicate that affected parties such as creditors lack knowledge of business rescue legislation.

²³³ Meskin op cit note 162 para 18.14.3.

provision to notify the Commission when one of its members is no longer a member “in good-standing” of that body. This further compounds the issue of non-accountability beyond being found grossly negligent or incompetent. A single regulator could surely solve this dilemma.

Meskin also submits that a BRP who has been removed should also result in suspension or the revocation of the BRPs license, however regulation 126 does not cater for this possibility.²³⁴ Regulation 126 allows the Commission to suspend or revoke a person’s license if it has reasonable grounds to believe that person is no longer qualified to be licensed.

Further, neither the Commission’s website nor the Act provide for a complaints procedure against a BRP. Therefore, the only method for removal of a BRP is via the section 139 court procedure of the Companies Act.

3.4.2 Replacement

Where a nominated BRP is removed, section 139(3) states that the company or any creditor who nominated the BRP must appoint a new practitioner if he dies, resigns or is removed.

3.5 Remuneration

Remuneration may have an effect on the impartiality and independence of the BRP.²³⁵ Generally, a BRP may charge the company for his remuneration and expenses, an amount in terms of the prescribed tariff of fees and expenses that is set by the Minister.²³⁶ This is intended to ensure certainty of costs. However, the BRP may propose an agreement to the company for additional remuneration on the basis of a contingency,²³⁷ for example, the adoption of a business rescue plan within any particular time.²³⁸ This agreement is final and binding on the company if it is approved by the holders of a majority of creditors’ voting

²³⁴ Meskin op cit note 162 at para 18.14.2.1.

²³⁵ Cassim...et al op cit note 146 at 891.

²³⁶ Companies Act, s143(1) read with s 143(6).

²³⁷ Companies Act, s143(2). See also Rushworth op cit note 215 at 392.

²³⁸ Companies Act, s143(2)(a).

interests, present and voting at the meeting called for such purpose,²³⁹ and if it is approved by the holders (present and voting at the meeting) of a majority of the voting rights of any shares of the company that entitle that shareholder to a portion of the residual value of the company when it is wound up.²⁴⁰ Approval of the holders of the majority of the creditors' interests is important because it ensures participation and approval of persons with knowledge of what the company can afford to pay.

Furthermore, a creditor or shareholder who voted against the proposed additional remuneration and expenses may apply to court within ten business days after the vote for an order to set aside the agreement²⁴¹ on the grounds that the agreement is not just and equitable²⁴² or that the additional remuneration is unreasonable with regard to the financial circumstances of the company.²⁴³

Neither Chapter 6 of the Companies Act nor the Companies Regulations of 2011 make provision for the BRP's basic remuneration under the Minister's tariff to be taxed. Meskin states that 'considering the rather liberal hourly and maximum daily tariff the practitioner is entitled to, it seems unwise not to make provision for the amounts claimed to be scrutinised by an independent party in order to ensure that there is no abuse by practitioners claiming excessive fees.'²⁴⁴ This is a further example of how business rescue practice may be easily corrupted because of the lack of a single governing body which would monitor the regulation not only of the skills and experience of the BRP but also provide a system making it possible to audit remuneration, similarly to the way that professional bodies allow for recourse in cases where a professional is over-charging for their services.

This chapter having deconstructed South Africa's insolvency system and in particular the regulation of the skills and experience of BRPs with reference to England and South Africa's

²³⁹ Companies Act, s143(3)(a); See also *ABSA Bank Ltd v Golden Dividend 339 (Pty) Ltd and Others* 2015 (5) SA 272 (GP) at paras 66-70 where remuneration agreement was struck down because there was no valid meeting convened to approve such agreement.

²⁴⁰ Section 143(3)(b).

²⁴¹ Section 143(4)

²⁴² Section 143(4)(a).

²⁴³ Section 143(4)(b).

²⁴⁴ Meskin op cit note 162 at para 18.14.6; See also *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others; Farm Bothasfontein (Kyalami) (Pty) Ltd v Kyalami Events & Exhibitions (Pty) Ltd and Others* (2012) JOL 28623 (GSJ) at para 10.

unique socio-economic and political context, has identified similarities and differences with regard to their implementation.

The three basic similarities observed are that in both countries:

1. BRPs must be licensed to act as such;
2. BRPs must be members of professional bodies, with provision being made for individuals who are not members of a professional body to apply and
3. BRPs are required to fulfil minimum levels of experience

Differences identified include the following:

1. The absence of a mandatory examination for BRPs in South Africa.
2. Authorities governing the regulation of administrators in England are the Secretary of State, Department of Business Innovation and Skills and the Insolvency Service. In South Africa the Commission, which is the highest authorising body of BRPs, does not seem to have any direct or transparent accountability to the State.
3. In England, RPBs are accredited by the Secretary of State, are bound by a Memorandum of Understanding, and provide minimum requirements for professional qualifications for its own profession as well as specific codes for administrators. South African professional bodies are not accredited, have only a set of codes for their own professions, and do not monitor members acting as BRPs. The Insolvency Service together with RPBs are responsible for monitoring administrators.
4. South Africa does not have a trade association for BRPs, entities which in England are responsible for communicating members' views to Government and the media, as well as facilitating professional and skills development for its members.

The conclusion will address the lack of transparent accountability to the State, the Commission and professional bodies; and, present a case for the establishment of a single regulator which would be accountable not only to the DTI, but also to the DEDTEA.²⁴⁵

²⁴⁵ This is a government department responsible for socio-economic transformation by developing policies on the promotion, development and growth in various sectors of the economy, available at <http://www.kznedtea.gov.za/index.php/2013-07-09-21-44-18> accessed on 19 Feb 2017.

CHAPTER 4

4.1 CONCLUSIONS AND RECOMMENDATIONS

At the time of writing this paper, business rescue and the profession of business rescue practitioners has only been in existence for five years in South Africa. It can hardly be said that this has been sufficient time in which to develop rescue culture.

This paper has identified both similarities and differences in the influence of English insolvency law on the regulation of business rescue in South Africa. South Africa's unique socio-economic and political history must be taken into consideration in order for insolvency law and its regulation of the skills and experience of BRPs to benefit South Africa's PDIs and communities. It is proposed in this conclusion that there is ample opportunity for improvements in the implementation of our laws and the processes of monitoring involved. It is further proposed that the idea of a creation of a single body and/or separate bodies responsible for the development and regulation of the skills and experience of business rescue practitioners be revisited.

Paragraph 394 of the *Legislative Guide* states that 'it is essential that the insolvency representative be appropriately qualified and possess the knowledge, experience and personal qualities that will ensure not only the effective and efficient conduct of the proceedings, but also that there is confidence in the insolvency system.' The *Legislative Guide* is a mere guide for nations who may want to use it as a foundation for their insolvency law systems because the Working Group realized that a universal model would be impossible as different nations have different needs, laws and socio-political views.²⁴⁶ It does nevertheless, recognise 'that some form of regulation is necessary.'²⁴⁷ The *Legislative Guide* identifies four aspects of regulation as essential; personal and professional qualifications, licensing and examinations.²⁴⁸

The international community agrees that insolvency laws and systems are a vital institution because they contribute to and are indeed essential for the development of credit markets

²⁴⁶ UNCITRAL Doc A/CN. 9/511 in par 2 at 3; *Legislative Guide* in par 17 and 15.

²⁴⁷ Loubser op cit note 43 at 137.

²⁴⁸ *Legislative Guide*, par 40 at 175; Loubser op cit note 43 at 133.

and entrepreneurship in developing countries.²⁴⁹ Considering that the South African government has since post 1994 continuously placed the onus of economic growth and employment creation upon its previously disadvantaged population through the encouragement of entrepreneurship from grass roots level, it is imperative that legislation encouraging the growth and protection of (rescue) businesses in this sector be developed in order to achieve a more overall cohesive economy.

Whilst South Africa's insolvency systems are sound, based as they are on English law which is far more established than ours, they lack transparency and a system of monitoring within existing regulatory frameworks. Calitz asserts that 'in an era of globalization of law that will inevitably accompany the globalization of the economy, it is thus vital to any law reform effort to keep with international trends and developments.'²⁵⁰ While this may be true, it does not automatically follow that because our laws are based upon those of a country which is deemed to be keeping up with international trends and developments, that South Africa will achieve the same result. As our economy is vastly different from other countries with effective corporate legislation, it is doubtful whether another country's legislation can be merely imported into South Africa.²⁵¹

This paper proposes that there is insufficient involvement by the State in the monitoring process. This together with the lack of a single accredited professional body responsible solely for BRPs or an association responsible for the skills and development of BRPs (such as the Insolvency Service and trade associations in England) creates a situation in which a potentially effective system of regulation falls short of its purpose.

England's insolvency system and its various organisms encompasses a complex yet consistent network that is monitored and regulated by bodies accredited by the Secretary of State and including associations such as the Joint Insolvency Committee, the Joint Insolvency Monitoring Unit, the Insolvency Practices Council and the Association of Business Recovery Professionals. Consistency throughout this network is maintained through the Memorandum of Understanding and SIPs. The Secretary of State for the

²⁴⁹ Calitz op cit note 9 at 295.

²⁵⁰ Ibid.

²⁵¹ Burdette op cit note 147 at 57; See also N Martin 'The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation' (2005) 28(1) *Boston College International and Comparative Law Review* 4-6.

Business Innovation and Skills Department has overall responsibility for insolvency policy in England. In South Africa, we have the DTI which is the government department responsible for business rescue and to whom the Commission is meant to be accountable. However, involvement by the DEDTEA, seeing as it is the government department responsible for socio economic transformation could go a long way in developing the impact of business rescue practice to include the informal sector as well as contributing to the development of skills and experience of new entrants to the profession. It should follow, given the lack of monitoring mechanisms in the field of business rescue practice, that these two Ministries are jointly tasked with the role of facilitating the accreditation of existing RPB's for the purpose of insolvency practice as well as investigating options for the creation of an examinable skills set for the profession, which would in turn contribute to skills development.

South Africa has no equivalent to England's Insolvency Service, an executive agency of the Business Innovation and Skills Department. Although bodies such as The Southern African Restructuring And Insolvency Practitioners Association (SARIPA) and The Association for Black Business Rescue and Insolvency Practitioners of South Africa (ABRIPSA) represent the interests of BRPs, neither organization may be considered objective enough to fulfil the role of a monitoring or a single regulatory body.²⁵² A partnership between the DTI and DEDTEA would not only encourage transparent accountability to the State, but also provide a platform for all stakeholders²⁵³ to contribute towards the development of acceptable codes of conduct and a standard set of examinable qualifications for BRPs, through the creation of a joint working committee that would include the representation and input of existing bodies such as the Commission and professional bodies as a forerunner to the creation of a single and impartial regulatory body. Such a joint working committee would have to prioritise a drafting of a Memorandum of Understanding that would be potentially acceptable to all stakeholders. England's Memorandum of Understanding provides a useful

²⁵²*The Southern African Restructuring And Insolvency Practitioners Association v The Minister of Justice And Constitutional Development and Others; In Re The Concerned Insolvency Practitioners Association NPC and Others v The Minister of Justice and Constitutional Development and Others* (2015) 1 ALL SA 589 (WCC) case is indicative of South Africa's racial divide in that both these organizations seem to be challenging the insolvency laws from a perspective of racial bias.

²⁵³ The Department of Small Business Development and its associated agency the Small Enterprise Development Agency "SEDA" would also provide a useful contribution to such a partnership as their vision includes development and increased participation of SMMEs and co-operatives in the formal economy.

reference point as it includes extensive obligations on the part of RPBs with regard to authorisation; maintenance of authorisation through monitoring; ethics and professional standing; complaints procedures; security and caution; disclosure and exchange of information; retention of records and reporting to the Secretary of State.

In England, trade associations such as the R3 and the SPI make sure that the qualifications of insolvency practitioners are kept up to standard by providing training courses, seminars, conferences and meetings. In South Africa there is an enormous skills vacuum. SARIPA is attempting to address this through its programme called the SARIPA Programme in Insolvency Law and Practice with the University of Pretoria.²⁵⁴ The Legal Education and Development (L.E.A.D) under the Law Society of South Africa in conjunction with the University of South Africa also offer an online course called the Advanced Short Course in Business Rescue Practice. Other professional bodies should also offer skills development courses specific to BRPs belonging to their bodies.

Given that business rescue culture is new and underdeveloped in South Africa and that the BRP is a newly formed profession, greater awareness needs to be created to ensure that a larger number of students who intend to forge careers in the fields of law, accounting and management are encouraged to enter the profession. Hence it is imperative that government, once having addressed the issue of an examinable qualifications requirement (incorporating the relevant aspects of law, accounting and management) for BRPs, extend this awareness and skills development to its education departments and its associated curriculum development and accreditation bodies, including the Skills Education Training Authorities (SETAs), for the introduction of business rescue into the Business Studies, Economics and Accounting curricula as early as in the senior phase (grades 10, 11 and 12). This would encourage more individuals to consider business rescue practice as a profession when entering the tertiary phase. An examinable skills set would provide measurable academic outcomes for the qualifications and skills required by a BRP. These in turn would provide a point of reference for the development of curricula in the senior and tertiary phases.

²⁵⁴ Available at http://www.saripa.co.za/pages/education_tuks.html, accessed on 18th February 2017.

Finally, the regulation of the skills and experience of BRPs is only valuable if they are applicable to our unique context. South Africa's laws on the regulation of the skills and experience of BRPs are built on a firm foundation; but gaps have been identified in our monitoring and regulation systems and suggestions have been proposed to address these challenges. Skills development must be prioritised to include the informal sector in order to sustain, if not develop, South Africa's economy. Ideally, regulatory bodies in South Africa must be governed by a Memorandum of Understanding, developed by a working committee of stakeholders, which could serve as the foundation for the creation of more effective systems of monitoring and regulation of BRPs as is evident in the law turned into practice in England.

BIBLIOGRAPHY**LEGISLATION**

South Africa

Companies Act 46 of 1926

Companies Act 61 of 1973

Companies Act 71 of 2008

Companies Regulations 2011 No.34239

National Small Business Act 102 of 1996

England

Company Directors Disqualification Act 1986

Enterprise Act 2002

Insolvency Practitioners (Recognised Professional Bodies) Order 1986 (SI 1986 No 1764)

Insolvency Practitioners Regulations, 2005 (SI 2005 No. 524)

Insolvency Practitioners Regulations, 2009 (SI 2009 No. 3081)

United Kingdom Insolvency Act of 1986

CASE LAW

South Africa

ABSA Bank Ltd v Golden Dividend 339 (Pty) Ltd and Others 2015 (5) SA 272 (GP)*Advanced Technologies and Engineering Company (Pty) Ltd (in business rescue) v**Aeronautique et Technologies and Others*, unreported, 6 June 2012 (GNP), case no 72522/11.*African Banking Corporation Ltd v Kariba Furniture Manufacturers (Pty) Ltd* (2015) 3 All SA 10 (SCA)*Copper Sunset Trading 220 (Pty) Ltd v Spar Group Ltd and Another* 2014 (6) SA 214 (LP)*Griessel and Another v Lizemore and Others* (2015) 4 All SA 433 (GJ)*Le Roux Hotel management (Pty) Ltd & another v E Rand (Pty) Ltd (FBC Fidelity Bank Ltd (Under Curatorship), Intervening)* 2001 (2) SA 727 (C).

Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others; Farm Bothasfontein (Kyalami) (Pty) Ltd v Kyalami Events & Exhibitions (Pty) Ltd and Others (2012) JOL 28623 (GSJ) at para 10.

The Southern African Restructuring And Insolvency Practitioners Association v The Minister of Justice And Constitutional Development and Others; In Re The Concerned Insolvency Practitioners Association NPC and Others v The Minister of Justice and Constitutional Development and Others (2015) 1 ALL SA 589 (WCC)

England

Re Charnley Davies Ltd (1990) BCC 605

BOOKS

South Africa

Cassim, FHI ...et al *Contemporary Company Law* 2 ed Cape Town:Juta, (2012).

MacDonald, M *Why Race Matters in South Africa* University of KwaZulu Natal Press, (2006).

Meskin, PM *Insolvency law and its operation in winding-up* PAM Magid, A Borraine, JA Kunst & DA Burdette (eds) (loose leaf from 1990), 19, Service Issue 47, June 2016, updated to May 2016 Lexis Nexis Durban, (1990).

Welsh, F A *History of South Africa* Harper Collins Publishers, (2000).

England

Keay, A & Walton, P *Insolvency Law: Corporate and Personal* 2 ed Bristol: Jordan Publishing Ltd (2008).

Millet, PC *The Encyclopedia of Forms and Precedents Bankruptcy and Insolvency (Corporate Insolvency)* 5 ed London: Butterworths, (2000).

Rajani, S *Corporate Insolvency* 2 ed Croydon: Tolley, (1994).

Sealy, L and Worthington, S *Cases and Materials in Company Law* 9 ed Oxford University Press, (2010)

JOURNALS

South Africa

Bradstreet, R 'Business rescue practitioners: What role for the legal profession' (July 2012) *De Rebus* 22

Bradstreet, R 'The Leak in the Chapter 6 Lifeboat: Inadequate Regulation of Business Rescue Practitioners May Adversely Affect Lenders' Willingness and the Growth of the Economy' (2010) 22 *SA Merc LJ* 195-213.

Bradstreet, R 'The New Business Rescue: Will Creditors Sink or Swim?' (2011) 128 *SALJ* 352-380.

Burdette, DA 'Some initial thoughts on the development of a modern and effective business rescue model for South Africa (Part 2)' (2004) *SA Merc LJ* 409-447.

Burdette, DA 'Some initial thoughts on the development of a modern and effective business rescue model for South Africa (Part 1)' (2004) 16 *SA Merc LJ* 241-263.

Burdette, DA 'Unified Insolvency Legislation in South Africa: Obstacles in the Path of the Unification Process' (1999) 32 *De Jure* 44-61

Calitz J and Burdette DA 'The appointment of insolvency practitioners in South Africa: time for a change?' (2006) 4 *TSAR* 721-751

Calitz, J 'Historical Overview of State Regulation of South African Insolvency Law' (2010) 16(2) *Fundamina* 1-27.

Calitz, J 'Some thoughts on state regulation of South African insolvency law' (2011) *De Jure* 290-318

Evans, R, Loubser, A, and Van der Linde, K 'Aspects of the Draft Insolvency Bill' (1999) 11 *SA Merc LJ* 210-226

Kloppers, P 'Judicial Management Reform-Steps to initiate a Business Rescue' (2001) 13 *SA Merc LJ* 358-378.

Le Roux, I and Duncan, K 'The naked truth: creditor understanding of business rescue: A small business perspective' (2013) 6 *The Southern African Journal of Entrepreneurship and Small Business Management* 57-74

Loubser, A 'Aiding the Development of a New Insolvency Law in South Africa: the UNCITRAL Draft Legislative Guide on Insolvency Law' (2003) 15 *SA Merc LJ* 396-406.

Loubser, A 'An International Perspective on the Regulation of Insolvency Practitioners' (2007) 19 *SA Merc LJ* 123-129.

Loubser, A 'Business rescue in South Africa: a procedure in search of a home?' (2007) 40 *CILSA* 152-171.

Loubser, A 'Judicial Management as a Rescue Procedure in South African Corporate Law' (2004) 16 *SA Merc LJ* 137-163.

Loubser, A 'The Insolvency Practitioner: Professional Status at Last?' (1999) 7(2) *Juta's Bus.L* 53-55

Loubser, A 'Tilting at Windmills? The Quest for an Effective Corporate Rescue Procedure in South African Law' (2013) 25 *SA Merc LJ* 437-457.

Papaya, R 'Are business rescue practitioners adequately regulated' (December 2014) *De Rebus* 29-30

Pretorius, M 'Tasks and activities of the business rescue practitioner: a strategy as practice approach' (2013) 17(3) *Southern African Business Review* 3-26.

Rajak, H and Henning J 'Business Rescue for South Africa' (1999) 116 *SALJ* 262-287.

Rushworth, J 'A critical analysis of the business rescue regime in the Companies Act 71 of 2008' 2010 *Acta Juridica* 375-408.

Valodia, I, Lebani, L, Skinner, C, and Devey, R "Low-waged and informal employment in South Africa" (2006) 60 *Transformation: Critical Perspectives on Southern Africa* 90-126

England

Armour, J and Mokal, RJ 'Reforming the Governance of Corporate Rescue: The Enterprise Act 2002' (2005) *LMCLQ* 28

Finch, V 'Insolvency Practitioners: Regulation and Reform' (1998) *Journal of Business Law* 334-354

Finch, V 'Regulating insolvency practitioners: rationalisation on the agenda' (2005) *Insolvency Intelligence* 1-6

SS Bajwa 'Rescue of Failing Businesses: Does Administration (amended by the Enterprise Act 2002) Adequately Provides for Rescue?' (January 3, 2013) *REFLECTIONS ON CORPORATE, PUBLIC AND INTERNATIONAL LAW* Lambert Academic Publishing 2014 1-11

Other

Anderson, C 'Viewing the Proposed South African Business Rescue Provisions from an Australian Perspective' (2008) 1 *Potchefstroom Electronic LJ* 1-31

Harmer, RW 'Comparison of Trends in National Law: The Pacific Rim' (1997-1998) 23 *Brooklyn Journal of International Law* 139-165

Hunter, M 'Nature & Function of a Rescue Culture' (1999) 104 *Commercial Law Journal* 426-463

Martin, N 'Common-Law Bankruptcy Systems: Similarities and Differences' (2003) 11 *ABI Law Review* 367-410.

Martin, N 'The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation' (2005) 28(1) *Boston College International and Comparative Law Review* 1-77.

Mistelis, LA 'Regulatory aspects: globalization, harmonization, legal transplants and law reform – some fundamental observations' (2000) 34(3) *The International Lawyer* 1055-1069.

Rochelle, MR 'Lowering the Penalties for Failure: Using the Insolvency Law as a Tool for Spurring Economic Growth; the American Experience, and Possible Uses for South Africa' (1996) 2 *TSAR* 315-330.

OTHER PUBLICATIONS

South Africa

The South African Law Commission (Project 63) *Review of the Law of Insolvency: Draft Insolvency Bill and Explanatory Memorandum* (1996).

England

Report of the Review Committee: *Insolvency Law and Practice, Report of the Review Committee* (Cmnd 8558) Chairman Sir Kenneth Cork GBE (1982)

Other

The United Nations Commission on International Trade Law (UNCITRAL) Doc A/CN.9/511 *Legislative Guide*

DISSERTATIONS

Loubser, A *Some Comparative Aspects of Corporate Rescue in South African Company Law* (unpublished LLD dissertation, UNISA, 2010).

Burdette, DA *Framework for Corporate Insolvency law reform in South Africa* (unpublished LLD dissertation, University of Pretoria 2002).

Calitz, J A *Reformatory Approach to State Regulation of Insolvency Law in South Africa* (unpublished LLD dissertation, University of Pretoria 2010)

THESES

Dick, C *The appointment and Regulation of Business Rescue Practitioners in South Africa: A comparative Study* (unpublished LLM thesis, University of Johannesburg, 2015).

Hoosien, M *The Weakest Link: The Regulation of the Business Rescue Practitioner* (unpublished LLM thesis, University of Johannesburg, 2014).

Mba, S *Rethinking Business Rescue in Nigeria: Borrowing Virtues from Chapter 11 of the US Bankruptcy Code* (unpublished LLM thesis, Central European University (CEU), Legal Studies Department, 2015).